LEEDS POLYTECHNIC
LIBRARY

LEEDS POLYTECHNIC
LIBRARY

FOR REFERENCE USE IN THE LIBRARY ONLY.

LEEDS BECKETT UNIVERSITY
LIBRARY
DISCARDED
1 0282730 0
TELEPEN

THE LAW REPORTS

[1921] 2 Appeal Cases

ISBN 0 406 09198 6

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1974

Reprinted by photolitho in Great Britain by
Chapel River Press, Andover, Hampshire

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

1921.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

House of Lords . . . . H. B. HEMMING, *Barrister-at-Law.*

Privy Council . . . . A. M. TALBOT, *Barrister-at-Law.*

1921.—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

Y10 282730 -0

LEEDS POLYTECHNIC
LEEDS BECKETT UNIVERSITY
LIBRARY
221207
DISCARDED
72415

JUDGES AND LAW OFFICERS.

MEMORANDA.

1921.

Jan. 27. Sir John Charles Lewis Coward, K.C., *was appointed to be a Commissioner under the Railway and Canal Traffic Act*, 1888, *to fill the vacancy caused by the resignation of John Thomas Baron Terrington.*

Feb. 1. The Right Hon. Viscount Cave, *Lord of Appeal in Ordinary, received the honour of a G.C.M.G.*

Feb. 8. The Right Hon. James Thomas Baron Terrington, *lately Chairman of the Railway Commissioners, died at his residence*, 42, *North Gate, Regent's Park, aged* 68.

Mar. 9. The Right Hon. John Fletcher Baron Moulton of Bank, *Lord of Appeal in Ordinary, died at his residence*, 57, *Onslow Square, London, in his 76th year.*

Apr. 15. Sir Alfred Tristram Lawrence, *one of the Justices of the High Court of Justice, was appointed to the office of Lord Chief Justice of England in the place of the Right Hon. the Earl of Reading, G.C.B., K.C.V.O., who resigned that office on appointment as Viceroy and Governor-General of India. Sir Alfred Tristram Lawrence was afterwards sworn of His Majesty's Most Honourable Privy Council and took his place at the Board accordingly.*

Apr. 25. George Arthur Harwin Branson, Esq., *Junior Counsel to the Treasury, was appointed one of the Justices of the High Court of Justice pursuant to an address from both Houses of Parliament, and was afterwards knighted.*

June 1. The Right Hon. Sir Edward Henry Carson, K.C., *was appointed to be a Lord of Appeal in Ordinary in the room of the Right Hon. Lord Moulton, deceased, and was granted the dignity of a Baron for life by the style and title of Baron Carson of Duncairn in the County of Antrim.*

June 15. *The dignity of a Viscount of the United Kingdom was conferred upon* The Right Hon. Frederick Edwin Baron Birkenhead, *Lord High Chancellor, by the style and title of Viscount Birkenhead of Birkenhead in the County of Chester.*

Aug. 30. *The dignity of a Baron of the United Kingdom was conferred upon* The Right Hon. Sir Alfred Tristram Lawrence, *Lord Chief Justice of England, by the style and title of Baron Trevethin of Blaengawney in the County of Monmouth.*

Nov. 20. The Right Hon. Sir Arthur Charles, *lately a Judge of the King's Bench Division of the High Court of Justice, died at his residence, Woodlands, Sevenoaks, in his 83rd year.*

Dec. 9. The Right Hon. Nathaniel Baron Lindley, *formerly a Lord of Appeal in Ordinary, died at his residence, East Carleton, Norwich, aged 93 years.*

Dec. 11. The Right Hon. Hardinge Stanley Earl of Halsbury, *formerly Lord High Chancellor, died at his residence*, 4, *Ennismore Gardens, London, aged 98 years.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1921, will be as follows:—

In the First Series,
[1921] 1 Ch. [1921] 2 Ch.

In the Second Series,
[1921] 1 K. B. [1921] 2 K. B. [1921] 3 K. B. [1921] P.

In the Third Series,
[1921] 1 A. C. [1921] 2 A. C.

The SCOTTISH LAW REPORTS are cited as follows:

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	„	„	„	.	.	„	D.
Macpherson, or, Third Series	„	„	„	.	.	„	M.
Rettie, or, Fourth Series	„	„	„	.	.	„	R.
Fraser, or, Fifth Series	„	„	„	.	.	„	F.
New Series	„	„	„	.	.	„	1907 S. C.
Scottish Law Reporter	„	„	„	.	.	„	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	„	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Alexandra (Owners of Steam Tug), Jaques *v.* – H. L.(E.)	339
Amodu Tijani *v.* Southern Nigeria (Secretary) – P. C.	399
Ard Coasters, Attorney-General *v.* H. L. (E.)	141
Assurance (Guardian) Co., Condogianis *v.* – – P. C.	125
Attorney - General *v.* Ard Coasters – – H. L. (E.)	141
Australasian United Steam Navigation Co. *v.* Hunt P. C.	351

B.

	PAGE
Bain *v.* Central Vermont Ry. Co. – – – – P. C.	412
Barnardo's Homes *v.* Special Income Tax Commissioners H. L. (E.)	1
Belvedere Fish Guano Co., Rainham Chemical Works *v.* H. L. (E.)	465
Blott, Inland Revenue Commissioners *v.* – H. L. (E.)	171
British and Foreign Marine Insurance Co. *v.* Gaunt H. L. (E.)	41

PAGE

British Bank for Foreign Trade, Russian Commercial and Industrial Bank *v.* – H. L. (E.) 438
Brown *v.* National Provident Institution – – H. L. (E.) 222

C.

Canadian Pacific Wine Co. *v.* Tuley – – – P. C. 417
Celia (S.S.) *v.* Volturno (S.S.) H. L. (E.) 544
Central Vermont Ry. Co., Bain *v.* – – – P. C. 412
Chemical (Rainham) Works *v.* Belvedere Fish Guano Co. H. L. (E.) 465
Clifford and O'Sullivan, In re H. L. (I.) 570
Cogstad & Co. *v.* Newsum, Sons & Co. – – H. L. (E.) 528
Commonwealth of Australia *v.* Hazeldell – – – P. C. 373
Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz, French Marine *v.* H. L. (E.) 494
Condogianis *v.* Guardian Assurance Co. – – – P. C. 125
Crane *v.* Public Prosecutor H. L. (E.) 299

D.

Dewes, Fitch *v.* – H. L. (E.) 158
Duchaine, Matamajaw Salmon Club *v.* – – – P. C. 426

F.

Fernando *v.* Gunatillaka P. C. 357
Fish Guano (Belvedere) Co., Rainham Chemical Works *v.* H. L. (E.) 465
Fitch *v.* Dewes – H. L. (E.) 158
French Marine *v.* Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz H. L. (E.) 494

G.

PAGE

Gaunt, British and Foreign Marine Insurance Co. *v.* H. L. (E.) 41
Gittus *v.* Inland Revenue Commissioners – H. L. (E.) 81
Glebe Sugar Refining Co. *v.* Greenock Port and Harbour Trustees – – H. L. (Sc.) 66
Great West Saddlery Co. *v.* The King – – – – P. C. 91
Greenock Port and Harbour Trustees, Glebe Sugar Refining Co. *v.* – – H. L. (Sc.) 66
Greenwood, Inland Revenue Commissioners *v.*– H. L. (E.) 171
Guardian Assurance Co., Condogianis *v.* – – – P. C. 125
Gunatillaka, Fernando *v.* – P. C. 357

H.

Hazeldell, Commonwealth of Australia *v.* – – P. C. 373
Hunt, Australasian United Steam Navigation Co. *v.* – P. C. 351

I.

Inland Revenue Commissioners *v.* Blott – – H. L. (E.) 171

Gittus *v.* – – H. L. (E.) 81

---

v. Greenwood – H. L. (E.) 171

J.

Jaques *v.* Alexandra (Owners of Steam Tug) – H. L. (E.) 339
Johnstone *v.* Pedlar H. L. (I.) 262

L.

La Société Maritime Francaise *v.* Shanghai Dock and Engineering Co. – – – P. C. 417*n*
Liverpool and London War Risks Insurance Association *v.* Richard de Larrinaga (S.S.) H. L. (E.) 14

M.

PAGE

Marine Insurance (British and Foreign) Co. *v.* Gaunt H. L. (E.) 41
Matamajaw Salmon Club *v.* Duchaine – – – P. C. 426
Moore, Smith & Son *v.* H. L. (Sc.) 13

N.

National Provident Institution, Brown *v.* – – H. L. (E.) 222
Newsum, Sons & Co., Cogstad & Co. *v.* – – H. L. (E.) 528

O.

Ogston *v.* Provident Mutual Life Association – H. L. (E.) 222
O'Sullivan and Clifford, In re H. L. (I.) 570

P.

Pedlar, Johnstone *v.* H. L. (I.) 262
Provident Mutual Life Association, Ogston *v.* – H. L. (E.) 222
Public Prosecutor, Crane *v.* H. L. (E.) 299

R.

Rainham Chemical Works *v.* Belvedere Fish Guano Co. H. L. (E.) 465
Rex, Great West Saddlery Co. *v.* – – – P. C. 91
—— Westralian Powell Wood Process, Ld. *v.* – – P. C. 133
Richard de Larrinaga (S.S.), Liverpool and London War Risks Insurance Association *v.* – – – H. L. (E.) 141

PAGE

Russian Commercial and Industrial Bank *v.* British Bank for Foreign Trade – H. L. (E.) 438

S.

Saddlery (Great West) Co. *v.* The King – – – P. C. 91
Shanghai Dock and Engineering Co., La Société Maritime Française *v.* – – – P. C. 417*n*
Smith & Son *v.* Moore H. L. (Sc.) 13
Southern Nigeria (Secretary), Amodu Tijani *v.* – – P. C. 399
Special Income Tax Commissioners, Barnardo's Homes *v.* H. L. (E.) 1
Steam Navigation (Australasian United) Co. *v.* Hunt – P. C. 351
Sugar Refining (Glebe) Co. *v.* Greenock Port and Harbour Trustees – – H. L. (Sc.) 66

T.

Tuley, Canadian Pacific Wine Co. *v.* – – – P. C. 417

V.

Vancouver Island (Bishop), Victoria City *v.* – – P. C. 384
Victoria City *v.* Vancouver Island (Bishop) – – P. C. 384
Volturno (S.S.), Celia (S.S.) *v.* H. L. (E.) 544

W.

War Risks Insurance Association (Liverpool and London) *v.* Richard de Larrinaga (S.S.) H. L. (E.) 141
Westralian Powell Wood Process, Ld. *v.* The Crown P. C. 133
Wine (Canadian Pacific) Co. *v.* Tuley – – – P. C. 417

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)*
1921
March 14.

DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCIATION . } APPELLANTS ;

AND

COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX ACTS } RESPONDENTS.

Revenue—Income Tax—Exemption of Charities—Residuary Bequest—Ascertainment of Residue—Income Tax on Interim Dividends—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 88, *Sch. C, r.* 3 ; *s.* 105.

By s. 88, Sch. C, r. 3, of the Income Tax Act, 1842, coupled with s. 105 of the Act, charitable institutions are exempted from the duties on any yearly interest or other annual payment chargeable under Sch. D, in so far as the same shall be applied to charitable purposes only, and the exemption is to be allowed by the Commissioners for Special Purposes on due proof before them.

A testator who died on November 14, 1914, by his will bequeathed the residue of his property, which consisted of stocks and shares, to a

---

* *Present :* VISCOUNT FINLAY, VISCOUNT CAVE, LORD ATKINSON, and LORD SUMNER.

H. L. (E.)

1921

BARNARDO'S HOMES v. SPECIAL INCOME TAX COMMISSIONERS.

charitable institution absolutely. Between the date of the testator's death and December 4, 1916, when the residue was finally ascertained and distributed, the executors received income of the estate from which income tax had been deducted at the source. The income so received by the executors was part of the fund handed over in due course by them to the charitable institution. The institution claimed the return of the income tax deducted on the ground that the deduction was contrary to s. 105 of the Income Tax Act, 1842:—

Held, that until the date when the residue was ascertained the institution had no property in any specific investment forming part of the estate, or in the income therefrom, that the payment by deduction of income tax made by the executors in respect of the income was not made on behalf of the institution, and that the institution was therefore not entitled to repayment of the income tax so paid.

Lord Sudeley v. *Attorney-General* [1897] A. C. 11 applied.

Decision of the Court of Appeal [1920] 1 K. B. 468 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of the Divisional Court. (2)

The question for determination was whether the exemption from income tax allowed by the Income Tax Act, 1842, s. 88, Sch. C, r. 3, and s. 105, on dividends of stocks and shares belonging to trustees for charitable purposes operated to relieve from income tax dividends accruing to the estate of a testator and paid to his executors in the course of the administration of the estate and before the ascertainment of the residue, in a case where the residue was bequeathed to trustees for charitable purposes.

The Divisional Court (Earl of Reading C.J. and Darling and Bray JJ.) answered this question in the affirmative and made absolute a rule for a mandamus against the respondents, the Commissioners for Special Purposes of the Income Tax Acts, commanding them to allow the exemption and to issue an order for repayment of the amount deducted for such income tax; but this order was discharged by the Court of Appeal (Lord Sterndale M.R., and Atkin and Younger L.JJ.).

The facts are stated in the report of the case before the Court of Appeal and in the judgment of Viscount Finlay.

1921. Feb. 18, 21. *Clauson K.C.* and *Disturnal K.C.* (with them *Dighton Pollock*) for the appellants. For the

(1) [1920] 1 K. B. 468. (2) [1920] 1 K. B. 26.

purposes of distinguishing between income and capital the residue exists before the quantum can be ascertained. It is admitted that the appellants are within the provisions of the Income Tax Act, 1842, by which the exemption is granted—namely, s. 88, Sch. C, r. 3, as extended by s. 105. If then the Legislature has exempted the appellants' income the question to be determined is what is in substance and in fact the income to which the appellants are entitled. The Court of Appeal have proceeded on the basis that until the residue is ascertained it cannot be said that the residuary legatees are entitled to anything and *Trethewy* v. *Helyar* (1) was relied on in support of that proposition ; but that decision was directed to another point and has no bearing on the present case. The appellants had a present right to the residue when ascertained. Subject to adjustment, they were entitled to the residue from the death of the testator, and the income which that residue earned, although the exact amount could not be ascertained till later. The tax deducted from the income in the hands of the executors was deducted from income which belonged to the appellants, subject to the right of the executors to apply it for purposes of administration, payment of debts, etc. The method by which the adjustment is to be made is explained in *In re McEuen* (2) and *In re Wills.* (3) The principle of *Allhusen* v. *Whittell* (4) applies by analogy. For the purpose of applying the exemption the crucial question is who in the events which have occurred turns out to be the real owner of the dividends from which the deduction is made ? In determining who is to bear the burden of the income tax and who is entitled to the exemption the Legislature always regards the person who actually receives the benefit of the income : *Williams* v. *Singer.* (5)

Clayton K.C. and *Sheldon* (*Sir Gordon Hewart A.-G.* and *Reginald Hills* with them) for the respondents. The question is not whether this charity ought to have this exemption in respect of these dividends but whether upon the language

(1) (1876) 4 Ch. D. 53.
(2) [1913] 2 Ch. 704.
(3) [1915] 1 Ch. 769.
(4) (1867) L. R. 4 Eq. 295.
(5) [1921] 1 A. C. 65.

H. L. (E.) 1921

BARNARDO'S HOMES v. SPECIAL INCOME TAX COMMISSIONERS.

used in the Income Tax Acts the exemption has been granted to it. In order to succeed, the charity must prove that during the relevant period: 1. these dividends belong to the charity, 2. are applicable to charitable purposes only, and 3. are so applied in fact. None of these conditions has been complied with. As to 1: Until the residue is ascertained the personal estate is vested in the executors, not as trustees for the beneficiaries, but for the payment of debts and for the purposes of administration. There is an essential distinction between an executor and a trustee. For example, an executor can plead the Statute of Limitations; a trustee cannot. This distinction is illustrated by *Phillipo* v. *Munnings* (1) and *Dix* v. *Burford*. (2) Executors do not become trustees for the beneficiary, in the case of a specific bequest, until assent, and, in the case of a residuary bequest, until the residue is ascertained. In the case of a specific bequest the beneficiary acquires title by relation back, but that doctrine does not apply in the case of a residuary bequest. During the relevant period the executors held these dividends, not for the appellants, but for the general purposes of the testator's estate. It is not until his executorial duties are discharged that an executor converts himself into a trustee. As to 2, that is really another way of looking at the first point. During the relevant period these dividends were not applicable to charitable purposes only, because debts might be paid out of them and debts are not charity. As to 3, that is covered by the preceding observations. There is no fund available for the charity until ascertainment of the residue. It is not put by the appellants that these dividends were the property of the charity, but their case is put on some sort of equitable accounting applicable to an estate settled on tenant for life and remaindermen on the analogy of *Allhusen* v. *Whittell*. (3) The House is asked to apply the doctrine of that case, which is applicable solely as between beneficiaries inter se where the testator has limited successive interests to be enjoyed, to a case of an absolute legatee, and as between the legatee

(1) (1837) 2 My. & Cr. 309. (2) (1854) 19 Beav. 409.
(3) L. R. 4 Eq. 295.

and the executors. Up to the time of the final distribution the appellants were entitled to nothing except so far as the executors chose to pay them on account. A residuary legatee has no right to any specific item of property at all, and until the executors have discharged all payments there is nothing which can be regarded as residue. No action at law lies against an executor for a general legacy or share of residue: *Deeks* v. *Strutt* (1); *In re West.* (2) The rights of a residuary legatee before distribution are defined by this House in *Lord Sudeley* v. *Attorney-General* (3), which is directly in point. The exemption is designed to relieve a charity which has an endowment and an income from that endowment. Until the residue was ascertained there was no title in the appellants to these dividends and they were never received by them as income.

Disturnal K.C. in reply. These stocks and the dividends arising therefrom belong to the charity. If an executor has property of the testator in his hands he may be compelled in a Court of equity to administer that estate according to the ordinary rules applicable to administration. The executor is in a fiduciary position qua such property. The fact that these appellants could not sue the executor at law does not solve the question whether the exemption applies. To determine that question it is necessary to distinguish between what is the corpus of the estate of the testator and what is the fruit of that corpus after his death and to see to whom the fruit of that corpus belongs. The question of the incidence of income tax and of the application of the exemption does not depend upon the manner in which the executors keep their accounts. The words in r. 3 " in so far as the same shall be applied to charitable purposes only " cannot be referred either to the date of the payment of the dividends or to the date when the tax is assessed. The question to what purposes these dividends are applied is to be determined by looking at the ultimate destination of the fruit of the property.

The House took time for consideration.

(1) (1794) 5 T. R. 690. (2) [1909] 2 Ch. 180, 186.
(3) [1897] A. C. 11, 15, 18, 21.

H. L. (E.) 1921

BARNARDO'S HOMES v. SPECIAL INCOME TAX COMMISSIONERS.

1921. March 14. VISCOUNT FINLAY. My Lords, this is an appeal from the decision of the Court of Appeal reversing the Court of King's Bench. The claim of the appellant is to a return of income tax on the ground that as a charity the appellant is entitled to exemption. The appellant is a corporation for charitable purposes. The Court of King's Bench (the Lord Chief Justice and Darling and Bray JJ.) made absolute a rule for mandamus to the Commissioners for Special Purposes of Income Tax to repay 338*l.* 0*s.* 7*d.*, which had been deducted for income tax on the income of the securities forming the estate of the testator, the appellant being the residuary legatee. The Court of Appeal reversed the Court of King's Bench and discharged the rule.

The testator died on November 15, 1914. His will made certain bequests and left the whole residue of his estate to the charity. The will, proved on December 21, 1914, was disputed by the next of kin, and an action was commenced by the executors in April, 1915, to have the will established. This action was settled on March 9, 1916, on the terms that the executors should hand over to the next of kin one-third of the capital of the testator's estate and one-third of the accrued income. The testator's debts were small and had been paid by the executors soon after probate was granted. During the period which elapsed before the settlement of the litigation with the next of kin, the executors received the dividends and interest on the stocks, shares, and securities which formed the testator's estate. Income tax was deducted at the source. The residue was ascertained on December 4, 1916, and the balance paid over to the next of kin and the appellant. Considerable payments had already been made on account, beginning on April 13, 1916, after the settlement of the action with the next of kin. These payments are set out on p. 73 of the Appendix.

On March 23, 1917, the appellant made a claim for repayment of the income tax which had been deducted from the income paid to the executors, on the footing that as to two-thirds the income must be taken to be income of the charity in accordance with the terms on which the probate action

had been settled and was, therefore, entitled to exemption. The Court of King's Bench issued a mandamus to the Commissioners to pay over these moneys, but this mandamus was recalled by the Court of Appeal, from whose decision the present appeal has been brought.

Provision is made for exemption from the duties in Schs. C and D in the case of charities (Income Tax Act, 1842, ss. 88 and 105). The third rule, under Sch. C, which is applied also to Sch. D, defines the exemption as being in the case of: "Third. The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity or soecity, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only; or the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purpose of divine worship, and in so far as the same shall be applied to such purposes; provided the application thereof to such purposes shall be duly proved before the said commissioners for special purposes by any agent or factor on the behalf of any such corporation, fraternity, or society, or by any of the members or trustees."

The exemption is to be granted on application to the Commissioners for Special Purposes, and they may be compelled by mandamus to return to the applicant any sum in respect of which exemption is properly claimed.

The exemption is granted by r. 3 in respect of the stock or dividends of any charity applicable to charitable purposes only, "in so far as the same shall be applied to charitable purposes only," provided the application to such purposes shall be duly proved before the said Commissioners. It is claimed for the charity that in substance the income to the extent of two-thirds must be taken to have been their own at the time the deduction was made. Under the compromise, it is said, the charity got this share, and although the residue

H. L. (E.) 1921

BARNARDO'S HOMES v. SPECIAL INCOME TAX COMMISSIONERS.

Viscount Finlay.

had not been ascertained at the date of the deduction the amount coming to the charity ultimately was diminished by these deductions in respect of income tax. For the Crown it is contended that the charity never received the income in question as such. The charity received, it is said, a lump sum, arrived at by adding to the amount of the share of the capital two-thirds of the amount of the income which had been received by the executors while the estate was in course of administration.

The King's Bench decided in favour of the charity on the ground that the executors had assented to the bequest of the residue and that this assent related back to the death of the testator, so that the dividends were by such relation the dividends of the charity when the deduction was made. The doctrine of relation, however, which applies to specific legacies, is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed. No attempt has been made in your Lordships' House to support the claim of the charity upon this ground.

It appears to me that the present case is really decided by the decision of this House in *Lord Sudeley's Case.* (1) It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete. The income from which this income tax was deducted was not the income of the charity. It was the income of the executors. They were, of course, bound to apply it in a due course of administration but they were not trustees of any part of it for the charity. There had been no creation of a trust in favour of the charity in respect of this income, it was never paid over to the charity as income. What was ultimately paid over on the close of the administration was the share of the whole estate, consisting of capital and accumulated income, which fell to the charity. The executors, not the charity, were the recipients

(1) [1897] A. C. 11.

of this income, and there is no relation back in the case of the bequest of a residue. If no right of deduction at the source had existed it is the executors and the executors only who could have been made liable for the tax.

In my opinion, the decision of the Court of Appeal was right and this appeal should be dismissed.

VISCOUNT CAVE. My Lords, I am of the same opinion. The third exemption in s. 88, Sch. C, of the Income Tax Act, 1842, applies to: "the stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only."

Sect. 98 provides machinery for obtaining the return of any duty deducted from stock or dividends which fall within the exemption. Sect. 105 extends the above exemption to any yearly interest or annual payment chargeable under Sch. D of the Act in so far as the same are applied to charitable purposes only, and continues as follows: "and the amount of the duties which shall have been paid by such corporation, fraternity, society, or trustee in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the order of the said commissioners for special purposes in the manner hereinbefore provided for the repayment of sums allowed by them, in pursuance of any exemption contained in the said Schedule (C)."

It is under these sections that the appellants claim repayment of duty.

On reading the above provisions it is clear that exemption is given only in respect of any dividends, interest or other annual payments "of"—that is to say, belonging to—a charity, or which according to its trust instruments are applicable to charitable purposes only, and only in so far as they are in fact applied to charitable purposes. The

H. L. (E.) 1921 BARNARDO'S HOMES v. SPECIAL INCOME TAX COMMISSIONERS. Viscount Cave.

appellants must therefore, in order to succeed in their claim, prove that the dividends from which tax was deducted were dividends (*a*) belonging to the appellants, or (*b*) applicable to their charitable purposes only, and (*c*) in fact so applied. Plainly this cannot be said of these dividends when received. When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration. This was fully explained in *Lord Sudeley* v. *Attorney-General*. (1)

But it is argued on behalf of the appellants that, the residue having now been ascertained and divided, they are at liberty to investigate the accounts and to ascertain what part of the fund so divided represented income, and to recover the tax on their share of the sum so ascertained; and for that purpose they claim to resort to the well-known rule in *Allhusen* v. *Whittell* (2), where it was held that as between a tenant for life under a will and the remainderman, the tenant for life is entitled as from the death of the testator to a sum equal to the income of the residue of the estate after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay the testator's debts and legacies. In my opinion this argument is misconceived. The rule in *Allhusen* v. *Whittell* (2) is confined to cases where a residuary fund is held in trust for several persons in succession, and where for the purposes of ascertaining the rights of the beneficiaries inter se, it is necessary to disentangle the accounts and to determine what part of the total fund should be treated as income and paid to the life tenant. In this case there is no trust and no life tenant; and there is no authority whatever for applying the rule in question to a case where the residuary legatee is absolutely

(1) [1897] A. C. 11. (2) L. R. 4 Eq. 295.

entitled to the residue. In my opinion this contention also fails.

For the above reasons I agree that the appeal should be dismissed with costs.

LORD ATKINSON. My Lords, I think the judgment appealed from is right. I further think that the King's Bench Division were by the counsel for the Special Commissioners of Income Tax induced to give a judgment in favour of the present appellants, on the erroneous assumption that a certain principle applicable to the case of a specific legacy applied to a bequest of the residue of a testator's estate—namely, that the assent of an executor to a specific legacy when once given relates back to the death of the testator and vests in the legatee the property in the specific legacy from that date. That principle has no application whatever, and could not in the nature of things have any application whatever, to a legacy of the residue, which is, as its name indicates, only the property or fund which remains after all claims upon the testator's estate have been satisfied. The case of *Lord Sudeley* v. *Attorney-General* (1) decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. And if this be so, then it cannot be held that until the residue has been ascertained any residuary legatee is entitled thereto within the meaning of s. 88, Sch. C, of the Income Tax Act, 1842, or that the payment of income tax on any portion of the income of the testator is a payment made on behalf of the residuary legatee. Rule 3 of Sch. C does not apply, because what is applicable to the charity is the residue when ascertained.

The principle applied by a Court of equity to a case between a tenant for life and a remainderman of a residue, to prevent the entire income of that fund being, during the life of the

(1) [1897] A. C. 11.

H. L. (E.) 1921 BARNARDO'S HOMES v. SPECIAL INCOME TAX COMMISSIONERS.

tenant for life, taken towards discharging the claims on the testator's estate has no application to the present case. The compromise of the probate suit cannot, of course, affect the right of the Crown to levy income tax on that income, or affect the question in controversy in this suit. I think the appeal should be dismissed. Owing to the course which was taken I do not think the Crown are entitled to costs either here or in either of the Courts below.

LORD SUMNER. My Lords, I concur.

VISCOUNT FINLAY. My Lords, I am informed that Lord Moulton, who sat on the hearing of this appeal, had prepared before his death a judgment arriving at the same result which has been expressed in the opinions which have been delivered.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 14, 1921.

Solicitors for the appellants: *H. B. Nisbet & Co.*

Solicitor for the respondents: *H. Bertram Cox, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

JOHN SMITH AND SON . . . . . APPELLANTS ; H. L. (Sc.)*

AND

MOORE . . . . . RESPONDENT.

1921

April 12.

Revenue—Excess Profits Duty—Computation of Profits—Deductions—Purchase Price of Coal Contracts—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 40, *sub-ss.* 1 *and* 2; *Sch.* 4, *Part I., ss.* 1 *and* 3, *Part III., s.* 1 (*a*); *Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, First Case, r.* 3.

The appellant's father carried on business as a shipping and coal agent for many years prior to his death on March 7, 1915, when the appellant acquired the business under his father's trust disposition and settlement on the terms of taking over the assets of the business at a valuation but without paying anything for goodwill. The assets included certain forward coal contracts made by the father with several colliery owners for the delivery of coal by the latter in periodic instalments at prices which ultimately turned out to be very advantageous to the purchaser. These coal contracts were valued at 30,000*l.* The appellant claimed, in arriving at the amount of the profits of the business chargeable to Excess Profits Duty under the Finance (No. 2) Act, 1915, in an accounting period from March 7, 1915, to December 31, 1915, to deduct this 30,000*l.* as representing part of the purchase price of the stock in trade:—

Held, by Viscount Haldane, Viscount Cave, and Lord Sumner, Viscount Finlay dissenting, that the deduction was not permissible; by Viscount Haldane and Lord Sumner, upon the ground that it was in respect of a capital expenditure; by Viscount Cave, on the ground that the Excess Profits Duty was a tax on a continuous business, and that for the purposes of the appeal the change of ownership ought to be disregarded.

City of London Contract Corporation v. *Styles* (1887) 2 Tax Cas. 239 applied.

Decision of the Second Division of the Court of Session in Scotland 1920 S. C. 175 affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session as the Court of Exchequer in Scotland upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts. (1)

The facts are fully stated by Viscount Haldane in his judgment and are summarized in the headnote.

The only question for decision upon the appeal was whether

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY and LORD SUMNER.

(1) 1920 S. C. 175.

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE.

in the circumstances of the case the appellant James Ross Smith, who carried on business as a coal exporter in Glasgow in succession to his father under the name of John Smith & Son, in arriving at the amount of the profits of the business chargeable to Excess Profits Duty during an accounting period from March 7, 1915 (the date of his father's death), to December 31, 1915, was entitled to deduct a sum of 30,000*l.* paid by him on acquiring the business as the value of certain unexpired coal contracts on the ground that this sum represented part of the purchase money of his stock in trade.

The Second Division, by a majority (the Lord Justice-Clerk, Lord Dundas and Lord Guthrie; Lord Salvesen dissenting), held upon this point that the deduction was not admissible.

1921. Feb. 21, 22. *Sir John Simon K.C.* and *A. M. Latter* (with them *D. P. Fleming* (of the Scottish Bar)) for the appellants. The deduction of the 30,000*l.* paid by the appellants for these coal contracts is permissible, in a question of excess profits duty, as being a disbursement or expense incurred for the purposes of the appellants' trade or business and in order to earn the profits thereof, being in fact part of the price paid by them for the purchase of their stock in trade. The judgments of the majority of the Second Division ignore the vital distinction between fixed assets and floating assets. This distinction is clearly stated by Lord Johnston in *J. & M. Craig (Kilmarnock) Ld.* v. *Inland Revenue Commissioners* (1) and by Lord Atkinson in *Farmer* v. *Scottish North American Trust.* (2) The appellants also rely upon the definition of profits and gains given by Lord Atkinson in that case. He says: "The profits and gains of any transaction in the nature of a sale must, in the ordinary sense, consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell, or produce and sell, the article vended." If the appellants had not paid the 30,000*l.* they could not have got delivery of the coal by the sale of which their

(1) 1914 S. C. 338, 348. (2) [1912] A. C. 118, 125, 127.

profits were made. The purchase of the right to call for the coal stands on the same footing as the purchase of the coal itself. *City of London Contract Corporation* v. *Styles* (1), which is relied upon by the respondent, is an authority only to the effect that payments in the nature of capital charges may not be deducted from profits, and has no application to the case of payments made against revenue for the delivery of trading stock. Bowen L.J. arguendo there puts the distinction which the appellants seek to enforce—the distinction between laying out money to acquire some fixed capital assets and laying out money for the purpose of buying some stock for resale at a profit.

Sir Gordon Hewart A.-G. and *T. B. Morison L.A.* (with them *R. C. Henderson* (of the Scottish Bar)) and *Reginald Hills* (of the English Bar)) for the respondent. This is a continuing business, and it is the business which has to bear the tax. The question is not what was the appellants' profit but what was the profit of the business. Here is a business which existed before the war and during the war increased its profits. The Legislature has said: "We will not enter into fine distinctions as to the origin of the profits, but the excess over the pre-war profits is to be the subject of tax."

[They referred to the Finance (No. 2) Act, 1915, s. 38, sub-ss. 1 and 2, s. 39, s. 40, sub-ss. 1 and 2, s. 45, sub-s. 2, Sch. 4, Part I., r. 1, Part III.; and to the Income Tax Act, 1842, s. 100, Sch. D, First Case, r. 3.]

This 30,000*l.* was not an expense of the business of John Smith & Son, but was an expense on capital account. It was not a sum related to the price of the coal under the contracts but was a payment made as part of a domestic arrangement between the father and the son as to the terms on which the latter should acquire the business. *City of London Contract Corporation* v. *Styles* (1) is exactly this case. That decision was expressly followed and approved by the Court of Appeal in *Alianza Co.* v. *Bell* (2), which was affirmed by this House for the reasons given by the Court of Appeal.

(1) 2 Tax Cas. 239.
(2) [1905] 1 K. B. 184, 193, 196; [1906] A. C. 18.

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE.

Royal Insurance Co. v. *Watson* (1) also is an analogous case. *J. & M. Craig* (*Kilmarnock*) v. *Inland Revenue Commissioners* (2) does not affect this case. The decision in that case was merely that the Inland Revenue was not entitled to take a purely bookkeeping entry as the true value of the stock in trade.

[Reference was also made to Lord Herschell's definition of profits in *Russell* v. *Town and County Bank.* (3)]

Sir John Simon K.C. in reply. As to the argument that this is a tax on a continuous business, continuity is a permissible conception, where there has been a change of ownership, for the computation of the pre-war standard of profits, it is not a permissible conception for the present purpose. The only thing for which the appellants can be held accountable is the profits and gains during their ownership. It is said that what is taxed is the business irrespective of the person to whom it belongs and not the person, and that if the business makes a profit the appellants are liable. But the statute is careful to say that everybody has to pay his own tax, and for that reason, if there is a change of ownership in the middle of an accounting period, the Commissioners are empowered to divide the period into two. For the purposes of excess profits duty you arrive at the profits by confining yourself strictly to the accounting period. Therefore the question comes to this, what are the actual profits made by the appellants in the accounting period ? Upon this point the reasoning of Lord Salvesen is irresistible. This 30,000*l.* was paid for providing the appellants with their circulating capital and was not an expenditure on capital account.

[He referred to *Verner* v. *General and Commercial Investment Trust* (4) ; *J. P. Hall & Co.* v. *Inland Revenue Commissioners* (5) ; *Dovey* v. *Cory.* (6)]

The House took time for consideration.

VISCOUNT HALDANE. My Lords, the question in this appeal is whether the appellants are entitled to deduction

(1) [1897] A. C. 1, 8.
(2) 1914 S. C. 338.
(3) (1888) 13 App. Cas. 418, 424.
(4) [1894] 2 Ch. 239, 266.
(5) [1921] 1 K. B. 213.
(6) [1901] A. C. 477, 493.

of a certain sum of 30,000*l.* in the estimation of the excess profits on which they were liable under s. 38 of the Finance Act (No. 2) of 1915, for excess profits duty, in an accounting period between March 7, 1915, and December 31 in the same year. The appellants say that this 30,000*l.* was a disbursement or expense incurred by them for the purposes of their trade or business, and necessitated in order to earn its profits, having in truth been paid for the purchase of coal as part of their stock in trade. The respondent, the Surveyor of Taxes in Glasgow, who contests this claim on behalf of the Crown, says, that the 30,000*l.* was capital expenditure which cannot, consistently with the statute, be deducted. He contends that it was paid, not as the price of coal for stock in trade, but as part of the price given for a business which the appellants acquired, the value of which formed part of the capital of their own business.

The Second Division of the Court of Session, sitting as the Court of Exchequer in Scotland in the exercise of original jurisdiction, and consisting of the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie, decided by a majority in favour of the respondent, Lord Salvesen dissenting. The question was brought before them on a case stated under the Taxes Management Act of 1880. There was another point on which the judgment of the Court of Session was taken, as to an allowance for management salary of 20,615*l.* 17*s.* 9*d.* to a Mr. Fair as a manager of the business. This latter point was, however, abandoned at the Bar of the House and has not to be considered.

In the accounting period between March 7 and December 31, 1915, the gross profits made by the firm on certain coal contracts amounted to 98,897*l.*, and, after deducting expenses and making adjustments, there remained 90,366*l.*, which was taken as the profit in the period through which the appellants were assessed for excess profits duty. It is from this amount that the appellants claim to be entitled to make the deduction in controversy.

My Lords, it is necessary in the first place to state the circumstances under which the appellants became entitled to

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Viscount Haldane.

the business. The late John Smith, junior, died on March 7, 1915. At the time of his death he was carrying on alone the business of John Smith & Son, a firm which had pursued the business of coal and shipping agents for many years. By a trust disposition and settlement he directed his trustees to make over the business after his death, in the events which happened, to his son John Ross Smith. The goodwill and firm name were to belong to the latter without payment for them. But he declared that "the whole assets of the said business shall be taken over at the value which may be ascertained from a balance sheet made up as at the date of my death by a chartered accountant, but nothing shall be charged for goodwill."

My Lords, pausing here, I will state the interpretation which, as I think, ought to be placed on the trust disposition. It appears to me that the testator meant to leave his business as an entirety to his son, the appellant, subject only to this qualification, that his son should be willing to pay over to the trustees an amount in respect of what was so given to him which would in part fill the gap in the testator's estate made by his gift. Nothing was to be payable in respect of the goodwill, but the amount to be replaced was to be ascertained by a valuation of all the other assets as they stood in the business at the date of the testator's death. These assets were to pass under the gift along with the business and its goodwill, if the son elected to take them, and he was to be charged not as on a sale to him of each asset in the open market but on a valuation, to be made in the manner prescribed, of the whole assets of the business, the goodwill being included without charge for it.

My Lords, the appellant elected to take on the terms of the will. A firm of chartered accountants prepared a balance sheet in which they valued the assets, among which were two especially valuable items, debts outstanding as due to the firm, amounting, with agents' balances, to over 32,000*l.*, and coal contracts which the accountants valued at 30,000*l.* These contracts had been entered into by the testator with several colliery owners, and under them the latter had agreed to deliver

over periods certain quantities of coal at prices which turned out in the end to have been very advantageous. The accountants stated, in a note to their balance sheet, that, having regard to contingencies existing at the date of the testator's death, and to a doubt whether sales to outsiders of the contracts would have been recognized by the colliery owners, they thought the amount of 30,000*l.* in all the circumstances a fair and equitable one.

The appellant took over the business as from March 7 and carried it on through the accounting period to December 31, 1915. He made the profit by means of these coal contracts of 90,000*l.*, to which I have already referred. The contracts were contracts which apparently were for short terms, and it was therefore necessary to realize their fruits. This was done, and a large profit was the result.

My Lords, profit may be produced in two ways. It may result from purchases on income account, the cost of which is debited to that account, and the prices realized therefrom are credited, or it may result from realization at a profit of assets forming part of the concern. In such a case a prudent man of business will no doubt debit to profit and loss the value of capital assets realized, and take credit only for the balance. But what was the nature of what the appellant here had to deal with? He had bought as part of the capital of the business his father's contracts. These enabled him to purchase coal from the colliery owners at what we were told was a very advantageous price, about fourteen shillings per ton. He was able to buy at this price because the right to do so was part of the assets of the business. Was it circulating capital?

My Lords, it is not necessary to draw an exact line of demarcation between fixed and circulating capital. Since Adam Smith drew the distinction in the Second Book of his Wealth of Nations, which appears in the chapter on the Division of Stock, a distinction which has since become classical, economists have never been able to define much more precisely what the line of demarcation is. Adam Smith described fixed capital as what the owner turns to profit by

H. L. (Sc.) 1921

JOHN SMITH & SON v. MOORE.

Viscount Haldane.

keeping it in his own possession, circulating capital as what he makes profit of by parting with it and letting it change masters. The latter capital circulates in this sense.

My Lords, in the case before us the appellant, of course, made profit with circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings and reselling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that, although they may have been of short duration, they were none the less part of his fixed capital. That he had paid a price for them makes no difference. Indeed the description of their value by the accountants, in the words I have earlier referred to, as of doubtful validity in the hands of outsiders, emphasizes this conclusion. The 30,000*l.* paid for the contracts or its equivalent, therefore, became part of the appellant's fixed capital and could not properly appear in his revenue account. If that be so, then it was a sum employed as capital in his trade, and has to be excluded as a deduction from the profits on which he is assessed. This results from the express provisions of ss. 38 and 40 of the Finance (No. 2) Act, 1915, which governs his case, and the first part of the Fourth Schedule to that Act, which incorporates certain analogous provisions of Sch. D of the Income Tax Act of 1842, including r. 3 of the First Case. Capital, within the meaning of these provisions, seems to me in any view to include such fixed capital as I think we have described to us in this appeal.

For these reasons I have come to the conclusion that the contention for the Crown is right, and that the appeal ought to be dismissed with costs.

VISCOUNT FINLAY. My Lords, in this case the appellant, John Ross Smith, who carries on business under the name of

"John Smith & Son," appealed to the Court of Session against an assessment for excess profits duty made under s. 38 of the Finance (No. 2) Act, 1915, in the sum of 52,081*l.* for the accounting period from March 7, 1915, to December 31, 1915. He claimed that in arriving at these profits a deduction should be made for 30,000*l.* paid to the trustees of his father, the late John Smith, junior, for unexpired coal contracts.

The business is that of a coal exporter, and it has been carried on for many years. John Smith, junior, was the sole partner up to his death on March 7, 1915. By his trust disposition and settlement, dated January 7, 1909, he appointed trustees to whom he made over his whole estate in trust. The third trust was to make over to the appellant, who is himself one of the trustees, the said business of coal exporter, the goodwill to belong to the appellant without any payment being made by him for it, declaring that the whole assets of the said business shall be taken over at the value which may be ascertained from a balance sheet made up as at the date of the testator's death by a chartered accountant. The capital of the estate was left on trusts.

The appellant became the sole partner in the business as from March 7, 1915. A balance sheet was prepared as directed by the settlement. It showed 27,927*l.* 18*s.* 1*d.* to the credit of the trustees in respect of the assets of the business. This amount was arrived at by allowing 30,000*l.* as the amount to be paid to the trustees as the value of certain coal contracts. These coal contracts had been entered into by the settlor with certain colliery owners, who thereby agreed to deliver certain large quantities of coal at fixed prices. The duration of these contracts varied, but none extended beyond December 31, 1915. The chartered accountants appended a note to their balance sheet giving their reasons for considering 30,000*l.* as the fair amount to be paid in respect of these contracts. Since the contracts were entered into the value of coal had risen greatly owing to the war, and the contracts were beyond all question very valuable. The price in the contracts was 14*s.* a ton, while the market price at the date of the settlor's death was 44*s.* per ton.

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Viscount Finlay.

The appellant continued to carry on the business and in the course of it he used the coal which he got under these contracts for supplying his customers. He claimed to have allowed as against his profits the 30,000*l.* which he had paid to the trustees for the coal so used in the business. This claim is contested by the Crown and forms the subject of the present appeal.

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Dundas and Lord Guthrie) decided for the Crown, Lord Salvesen dissenting.

The year ending December 31, 1915, was divided into two parts for the purpose of the assessment of the profits of the business. The trustees of the deceased, John Smith, junior, were assessed in respect of the profits arising up to the date of his death (March 7, 1915), while the appellant was assessed in respect of the period subsequent to that date down to the end of the year. It was contended for the appellant that the 30,000*l.* represented a sum which he had to pay for the coal which he used to supply his customers and that it could not be excluded from the computation of his profits for the accounting period. For the Crown, on the other hand, it was contended that the assessment of excess profits duty is upon the business as a continuing business, and that, as the succession of the son to the business was part of a family arrangement, he could not make this deduction any more than his father could have made it if he had carried on the business for the whole year, and further that the 30,000*l.* was capital expenditure which cannot be deducted.

The excess profits duty was introduced by Part III. of the Finance (No. 2) Act, 1915, and the decision in this case must depend on the effect of the provisions of that Act.

Sect. 38, sub-s. 1, provides for the levy as excess profits duty of an amount equal to 50 per cent. of the amount by which the profits of any trade or business in any accounting period exceed by more than 200*l.* the pre-war standard of profits. By s. 40, sub-s. 1, the profits for excess profits duty are to be determined on the same principles as profits for the purpose of income tax, subject to the modifications set out in

Sch. 4 to the Act, one of which is that the profits are to be the actual profits arising in the accounting period. This same s. 40, sub-s. 2, provides for the fixing of the "pre-war standard." It is to be ascertained by reference to the average profits of any two of the three last pre-war years to be selected by the taxpayer, provided that if their amount is less than the "percentage standard" the latter shall be the pre-war standard. The percentage standard is the amount of the statutory percentage (6 per cent. for corporations, 7 per cent. in other cases) on the capital of the trade or business as existing at the end of the last pre-war trade year, and provision is made for ascertaining for this purpose the amount of the capital according to Part III. of Sch. 4 of the Act.

It was not disputed, and indeed could not be disputed, on the statements contained in the case stated that the 30,000*l.* represents the fair value of these contracts taken over by the appellant. If the amount had been in any way unduly inflated it would have been brought to the notice of the Commissioners when the case was heard.

Of course if payment of the 30,000*l.* had been merely a transference by the appellant from one pocket to the other, the case would have assumed a totally different aspect. For instance, if the appellant had been the sole beneficiary under his father's will he in fact would have paid nothing for these coal contracts as he would have been himself the recipient of the price. There was a faint suggestion in the course of the argument for the Crown that the appellant is one of the beneficiaries who would take under the first and second trusts of the will. The terms of these trusts are not stated. We do not know whether the appellant would take any substantial interest under these trusts. The point was not mentioned in the Court of Session. If there were anything in it, it should have been raised before the Commissioners, who would have found upon it.

The argument on behalf of the Crown was threefold: I. that the excess profits duty is a tax upon a continuous business and that the change of ownership must for this purpose be disregarded; II. that the deduction sought was

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Viscount Finlay.

in respect of capital expenditure; and III. that the case is governed by the decision in *City of London Contract Corporation* v. *Styles*. (1) I take these points in the order in which I have mentioned them.

I. The contention most pressed at the Bar of your Lordships' House on behalf of the Crown was that the excess profits duty is a tax upon the business itself as distinguished from the persons who may from time to time carry it on. It was urged that the business is continuous, and that as these beneficial coal contracts had been acquired in the course of the business when it was carried on by the father, the sum which under the father's will the son had to give for them could not be allowed as an item in reduction of profits. It was pointed out that if the father of the appellant had lived until the end of the year the profits assessable to excess profits duty would have been precisely those on which the Crown now seek to charge the appellant, and it was urged that as the duty is on the business the change in the persons carrying it on should make no difference.

It is quite true that the statute imposing the excess profits duty treats the business as continuous for one purpose. As its name denotes, the excess profits duty is charged in respect of the excess of the profits yielded by any business after the outbreak of war as compared with its yield before the war. The business is regarded as remaining the same, although the person by whom it is carried on may have changed. This is consistent with the popular conception of a business as a thing which may exist for a century or more while the persons through whose hands the business passes may have changed over and over again from generation to generation by transmission or transfer, and it cannot be disputed that this conception of the business as an entity which continues is correct. But though for this purpose the business is treated as continuous, the essential incidence of the tax is upon the person by whom it is conducted at the time in question. Just as a rate is imposed upon the occupant in respect of the house, so income tax and super tax are imposed upon individuals

(1) 2 Tax Cas. 239; 4 Times L. R. 51.

in respect of the business. The yield of the business during any particular period depends upon the amount of profit which is got from it by the person carrying it on for the time being, and this must largely depend upon his personal qualities. The profits are not earned by the business; they are earned by the person who carries it on. The profits of this particular business down to March 7 were the profits earned by the appellant's father. After March 7 they were the profits earned by the appellant himself. In ascertaining what was the amount assessable to the tax, deductions have to be made from the gross profits of all the expenses incurred by the owner for the time being for the purpose of earning these profits. This, indeed, is involved in the very idea of profits.

The tax is leviable by s. 38 on the amount by which the profits arising from any trade or business in the accounting period exceed by more than 200*l.* the pre-war standard. The same form of expression "the profits arising from any trade or business" is adopted in s. 40, sub-ss. 1 and 2. The business makes no profits. The profits are not fruits yielded by a tree spontaneously. They are the result of the operations carried on by the owner of the business for the time being and of the ability which he brings to bear upon it.

For a long time the main stress of the argument for the Crown was rested upon s. 45, sub-s. 2, of the Excess Profits Duty Act. It was contended that the effect of this enactment is that any owner for the time being of a business may be assessed to the excess profits duty although he had nothing to do with the business during the accounting period in which these excess profits were earned. It was insisted that this showed that the taxation was imposed upon the business and not upon the owner. I cannot so read the clause. The excess profits duty is charged not on the business but on the person who carried it on in the relevant accounting period. I cannot consider s. 45, sub-s. 2, as empowering the Commissioners to assess to the duty a person who had no interest in the business during the accounting period in respect of which the assessment is made. The last words of the sub-section providing for a change of ownership are meant to meet the case

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Viscount Finlay.

of a change of ownership in the course of an accounting period, and in such a case to enable the Crown to take the accounting period as ending at the date of the change and assess the duty on the person who carried on the business at that date. I agree with the view which is expressed by Rowlatt J. as to the meaning and effect of this clause (s. 45, sub-s. 2) in the case of *Wankie Colliery Co.* v. *Inland Revenue Commissioners.* (1) The clause is not mentioned in any of the judgments in the Court of Session and appears to me to have been very properly left out from the pages in the appendix, on which are printed the sections which are relevant to the case.

It is quite clear that if the appellant's father had lived down to the end of the year 1915 he would have been chargeable on the whole profits for that year. He had made these contracts in the course of the business, and their existence, coupled with the fact that coal went up so greatly in value, would have enabled him in the course of the year 1915 to make these very large profits. The coal contracts were his own; he had not to pay 30,000*l.* nor any other sum in order to get the coal under them at 14*s.* a ton. But the change of the ownership of the business entirely altered the situation. The appellant was compelled under the trust settlement made by his father to pay 30,000*l.* as the price at which he acquired these contracts, and it was with the coal that he got under them that he carried on the business.

Separate computations in respect of the earlier and later parts of the year were necessary. Up to March 7 the business was the business of the father; from that date to the end of the year it was the business of the son. The profits must be computed in the usual way by comparing the amount got by the sale of the coal with the amount which it cost the owner for the time being to acquire it. Lord Salvesen at the close of his judgment points out with great force to what absurdities the argument for the Crown would lead:—

"Had there been no further rise in price, but the appellants had simply realised by sale the price paid by them (including

(1) [1920] 3 K. B. 287.

the 30,000*l.*), the result would have been that in your Lordships' view they must be assessed as for excess profits on this sum, or in other words would have to pay 18,000*l.* out of capital in name of excess profits duty although they had not earned a penny of profit. I can find no warrant for so construing the statute. Its object was not to confiscate capital used in trading, but to levy a tax on profits made by trading. Where no profits are made the Act has no application."

If the father had lived he would have made in 1915 a profit of 99,315*l.* 19*s.* 11*d.*, because he already had these highly beneficial coal contracts. How can it be said that the son is to be held to have made this profit when in fact he had made only 69,315*l.* 19*s.* 11*d.* owing to the circumstances that he had to pay 30,000*l.* to his father's trustees for these coal contracts ? If one assessment at the end of the year had been possible, there would still have been separate computations for the two parts of the year and the result would have been the same as on the separate assessments which have been made.

II. The second contention for the Crown was that the 30,000*l.* was capital expenditure.

It appears to me that this contention fails upon the facts. The contracts purchased all expired by the end of the current year. They covered only the stock required for the year ending December 31, 1915. It does not appear that the appellant or his father stored coal for delivery to the purchaser from them. It was more convenient to have the coal sent straight from the colliery to the purchaser. These contracts put at the command of the coal dealer the coal he required for delivery during the year. If the amount of coal which they represented had been in stock in yards belonging to the coal dealer it could not have been disputed that the price paid for it would have been a proper deduction as against the price realized by the resale. It can make no difference for this purpose that the coal dealer followed the more convenient practice of having contracts with the collieries and despatching it from the pit's mouth straight to his customers. There is not here any provision of coal for a long time ahead—there

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Viscount Finlay.

is no purchase of a colliery from which the coal is to be extracted—there is merely provision in the only convenient way for the stock required up to December 31, 1915, from March 7, 1915. There is nothing in the nature of capital expenditure in the purchase of the stock wanted for resale during the current year.

The coal represented by the contracts was circulating capital. It was bought for use in the business, and was so used. At one stage of the argument in this House an attempt was made to distinguish the case of contracts for coal from the case of coal already delivered and stored in a coal-dealer's yards, and the Lord Justice-Clerk in part rests his judgment in favour of the Crown upon the distinction between "goods" and "choses in action," such as contracts for coal. This distinction seems to me to be for this purpose untenable. The contracts gave the means of getting coal, and there is no difference for this purpose between having coal stored in your yard and having a contract which enables you to get it from time to time as you want it. This, indeed, was admitted by the Lord Advocate in argument when he was asked the question specifically by Lord Haldane. If the Crown is entitled to disallow what the appellant had to pay for these contracts it would be equally entitled to disallow as a deduction the price paid for coal actually in stock.

For the present purpose these coal contracts are not distinguishable from the coal which they represent. What the appellant had to pay for the coal was the 30,000*l.* which he gave for the contracts which would enable him to get the coal at a comparatively low price plus the sums which from time to time he paid for particular quantities deliverable at 14*s.* per ton. The price to him was made up of the 14*s.* per ton and a proportion of the 30,000*l.* on each delivery. The contracts cannot be regarded either in whole or in part as a fixed asset like a coal mine; they are merely the machinery for getting coal, and the coal which they commanded is the article by the resale of which the appellant made his profit. A contract for delivery of certain quantities of coal at a certain price may be made in consideration of a bonus paid when the

contract is entered into, in which case the price to be paid on delivery would be somewhat lower, or it may be constituted simply by the price to be paid on each delivery. In each case the whole amount so paid represents circulating capital, the coal which the purchaser means to resell. The purchaser does not resell the contracts; he uses them from time to time as he requires coal for resale. Where there is no bonus paid, it would not, I suppose, be suggested that there was any element of fixed capital in such contracts. How can the payment of a bonus affect the case? The only difference is that the price which the mine owner is content to take and the coal dealer to pay is in the first case made up by a bonus on entering into the contract, and the amounts paid on each delivery, while in the other case it consists simply in the payment of a larger amount as the price payable on each delivery.

It was further urged by the Crown that s. 159 of the Act of 1842 forbids any deductions on account of diminution of capital employed. This provision, of course, would cover the case of diminution of value of wasting assets as they are termed. If the owner of a coal business has a coal mine, the coal from which he uses for sale in his business, he would not be entitled to any deduction in respect of the fact that from year to year the mine is being worked out. The whole law on this point was investigated in the *Alianza Case*. (1) It has never before been contended that such a doctrine had any application to the case of goods purchased for resale, and resold in the course of business. The whole argument for the taxpayer in the *Alianza Case* was an attempt to assimilate the caliche beds to the case of goods bought for resale.

The 30,000*l*. cannot be treated as being part of the price paid for the business itself. This is clear from the terms of the trust disposition and settlement. Nothing was to be paid for the goodwill, but the assets were to be taken over at their value to be ascertained. Under these contracts the coal had been bought at 14*s*. a ton. Coal had risen to 44*s*. per ton

(1) [1904] 2 K. B. 666; [1905] 1 K. B. 184; [1906] A. C. 18.

H. L. (Sc.) 1921 — JOHN SMITH & SON v. MOORE. — Viscount Finlay.

market value, and the 30,000*l.* represented the value of the contracts which gave the right to acquire at 14*s.* a ton of coal worth 44*s.*

In the Appendix there occurs the following passage in the judgment of the Lord Justice-Clerk :—

"The appellants founded very strongly on the *Scottish North American Trust* (1) and particularly on Lord Atkinson's judgment at the foot of p. 29, and on *J. & M. Craig* (*Kilmarnock*) *Ld.* (2) Of course these judgments are binding on us, and I accept and respectfully agree with them. But they do not appear to me to affect the present case. They were both before the passing of the Act of 1915, and were therefore in no way affected by the statutory definition of capital contained in the Schedule to that Act."

With the utmost respect for the opinion of the Lord Justice-Clerk I cannot see how the application of these authorities is in any way affected by the statutory definition of capital in the schedule to the Act of 1915. In that schedule special provision is made with regard to the calculation of capital for the purpose of reaching the percentage standard (s. 40, Part III. of the Fourth Schedule), but the law as to the deductions to be made from gross profits is in no way affected by the statutory definition.

In *J. & M. Craig* (*Kilmarnock*) *Ld.* v. *Inland Revenue Commissioners* (3) Lord Johnston stated very clearly the difference between fixed assets and floating assets. The fixed capital assets comprised, he says, land, leases, works and plant. He goes on: "But there were other assets of a different kind, viz.: the floating assets consisting of the stocks of material to be worked up, and of the manufactured articles to be sold. With these the appellants' company had to commence business, and it was on the turnover of these, and their replacement by further material and further manufactured articles, that the company was to make its profit or loss." The whole of the argument which has been addressed

(1) [1912] A. C. 118; 1912 S. C. (H. L.) 26.
(2) 1914 S. C. 338.
(3) 51 S. L. R. 321, 327; 1914 S. C. 338, 349.

to your Lordships on behalf of the Crown on the score of the 30,000*l.* being in the nature of capital expenditure appears to me to ignore the broad distinction between these two classes of assets, the one class consisting of fixed assets, the other consisting of circulating assets which are bought for the very purpose of being resold.

I desire in this connection to refer to what was said by Lord Atkinson in delivering the judgment which was adopted by the other members of the House in *Farmer* v. *Scottish North American Trust* (1), and to quote what Lord Herschell said in *Russell* v. *Town and County Bank.* (2) He was dealing with the income tax, but his language is just as applicable to the excess profits duty.

"The duty is to be charged upon 'a sum not less than the full amount of the balance of the profits or gains of the trade, manufacture, adventure, or concern'; and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purpose of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed, you do not ascertain, and cannot ascertain, whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word 'profits' in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied."

What has to be ascertained for the purpose of excess profits duty in the present case is what profit the appellant made out of the business during the period from March 7 to December 31. In this calculation how is it possible to ignore what he had to pay for the coal by the sale of which his profits were made?

III. The third point made on behalf of the Crown was

(1) [1912] A. C. 118; 1912 S. C. (H. L.) 26.
(2) 13 App. Cas. 418, 424.

H. L. (Sc.) 1921

JOHN SMITH & SON v. MOORE.

Viscount Finlay.

that the present case is governed by the decision in *City of London Contract Corporation* v. *Styles*. (1)

It appears to me that the facts in that case differ from those in the present on all points material for the present purpose, and that the decision affords no guidance in this case.

The company there was formed to purchase the business of Charles Philips & Co., contractors for public works, and their contracts, plant, and materials, and to carry on the business. On assessment to income tax the company claimed a deduction of 80,000*l*. They stated that the 80,000*l*. represented part of the purchase money, 180,000*l*., paid to C. Philips & Co. for the purchase of the contracts and business on which their profits were realized. The business consisted entirely of partially executed or wholly unexecuted contracts. It was urged for the company that the money had been expended for the purchase of the business. "My whole contention," said their counsel, "is that it was not money invested as capital. You can use your capital in purchasing contracts from which you derive your annual profits. It is capital to start with, but then you use your capital wholly and exclusively for the purposes of your concern." To this Bowen L.J. answered: (2) "You do not use it 'for the purpose of' your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern." This answer was conclusive and really sums up the whole case. Lord Esher amplifies this a little. He points out that the 80,000*l*. was part of the purchase money of the business, part of the capital embarked in the business, and that to carry on the business other money must be found to meet the current expenses.

The business acquired in that case was the business of carrying on contracts for works, and as part of the business the contracts on hand were purchased. These contracts were for the construction of public works, railways, etc., to be carried out by the contractors. In the present case the business acquired was that of a coal dealer and the contracts

(1) 2 Tax Cas. 239; 4 Times L. R. 51. (2) 2 Tax Cas. 243.

were for the supply of coal for resale in the course of the business. The business was not to carry on these contracts—they were entered into and afterwards acquired merely as the most convenient way of getting coal to be supplied to customers of the business. The coal which they represented was all wanted for the current year and was all used for delivery during the year.

For the reasons which I have already given in dealing with the second contention for the Crown, these coal contracts in no way partake of the nature of capital; the 30,000*l.* was not paid as the price of the business but as part of the price of coal with which to carry it on.

For these reasons I think that the decision in the Court of Session was erroneous and should be reversed.

VISCOUNT CAVE. My Lords, I have arrived at the same conclusion as the noble and learned Lord on the woolsack, though by a somewhat different road.

The argument for the appellants appears to me to be founded upon the assumption that for the purpose of assessment to excess profits duty under the Finance (No. 2) Act, 1915, the profit made by Mr. John Ross Smith in acquiring the coal contracts and carrying on the business during the accounting period from March 7 to December 31, 1915, is to be compared with the trading profits earned by Mr. John Smith, junior, in the selected pre-war period. In my opinion this is not the comparison which the Act requires. The business of John Smith & Son, coal exporters, is one business, carried on by John Smith, junior, for many years before and down to his death on March 7, 1915, and thenceforth passing to and continued by his son John Ross Smith; and it appears to me that in such a case, the case of a continuing business which has changed hands during the war, the comparison to be made for the purposes of excess profits duty is a comparison between the trading profits earned in carrying on that business during the accounting period and those produced by the same business in the pre-war period, without regard to the change of ownership.

H. L. (Sc.)
1921
JOHN SMITH & SON v. MOORE.
Viscount Cave.

This appears from the terms of the Act. Sect. 38, sub-s. 1, and s. 40, sub-s. 2, refer to "the profits of the trade or business." Sect. 40, sub-s. 3, provides for a "change in the constitution of a partnership." Sect. 44, sub-s. 1, authorizes the Commissioners to require a return of profits from any person engaged in the trade or business "or who was so engaged during any accounting period or pre-war trade year." Sect. 45, sub-s. 2, gives the Commissioners a discretion where there has been "a change of ownership of the trade or business" either to commence a new accounting period or to allow the accounting period to remain unaltered. All these provisions, as well as r. 4 of Part II. of Sch. 4, appear to me to support the conclusion that a business commenced before the war and continued in wartime, though in new hands, is to be treated as one business for the purposes of the Act; and r. 5 of Part II. of the same schedule, which relates only to the profits earned in the pre-war period, does not afford any valid argument to the contrary. Where the change consists only of the accession of a new partner, I doubt whether any one would contend that the business is to be treated as a new business and the consideration paid by the new partner for his share brought into the account; and I think that for this purpose a transfer of the business with its goodwill and assets to a new owner stands on the same footing. In either case the business is treated as a going and continuing concern, and the comparison to be made under the Act is a comparison between the trading profits produced by carrying on that concern in the war and pre-war periods respectively. The whole purpose of the Act is to tax the profits of a business so far as enhanced by war conditions; and in this connection a change of partners or of owners is irrelevant, so long as the real continuity of the business is maintained. The business is the tree of which the produce in different periods is to be compared.

My Lords, I have dwelt on this point because I think that, if the construction of the Act is that which I have indicated, there is an end to this appeal. If the profits which are to be considered are the profits derived from the trading

operations of the continuing firm of John Smith & Son, however constituted, then the expenses to be deducted are those, and those only, which were incurred in the course of those trading operations; and it is plain that the 30,000*l.*, deduction of which is claimed, does not fall within that description. It was wholly unnecessary for any trading purpose of the business (regarded as a continuing concern) that 30,000*l.* or any other sum should be paid for the coal contracts; for those contracts belonged to the firm from the time when they were entered into. The 30,000*l.* was not paid by the firm for coal, nor was it paid by the trading firm as such for coal contracts; it was paid by John Ross Smith out of his private pocket as part of an overhead transaction under which the business with its assets and future profits passed into his hands, and it left the trading profits of the firm unaltered.

If I buy the crop of an orchard in a particular year for 20*l.* and sell it for 40*l.*, my profit is only 20*l.* But the profit of the orchard is 40*l.*; and in comparing the produce of the orchard in that year with its produce in another year, it is the 40*l.* and not the 20*l.* that must be taken into account.

I may add that the contrary view would lead to strange results. If John Smith, junior, had lived until the end of 1915, it is clear that he would have earned the profits assessed and would have had to pay the duty claimed. Can it be that, because he died in March and the business and business assets were transferred to his son upon terms involving a payment of 30,000*l.* for one of the assets, the assessable profit was reduced by that amount? If so, then if John Smith, junior, had lived for another six months and had then died, the contracts being still unperformed, the contracts might then have been valued at 60,000*l.*, and the assessable profits would have been reduced by that sum. And upon the same showing, if John Smith, junior, instead of dying, had at some time in 1915 converted the business into a company, the company paying 30,000*l.* or a larger sum for the coal contracts, the company would have been entitled to deduct the whole

H. L. (Sc.) 1921 — JOHN SMITH & SON v. MOORE. — Viscount Cave.

purchase money paid for those contracts from its assessable profits; and John Smith, junior, if he had held all the shares of the company, would have received the whole profit freed to that extent from excess profits duty. I cannot think that this is the true meaning and effect of the Act.

In any case the figures put forward by the appellants could hardly be accepted. If, for the purpose of ascertaining the profits during the accounting period, the business is to be treated as a new business commenced by John Ross Smith in March, 1915, it must also be so treated for the purpose of fixing the pre-war standard of profits; and in that case the profits of the accounting period would have to be compared, not with the pre-war figure of 4137*l.* (for John Ross Smith was not in business before the war), but with a percentage on his capital to be fixed in accordance with Sch. 4, Part II., r. 4. In my view, however, of the construction of the Act, these are not the figures which have to be taken into account.

For the reasons given above it appears to me that the 30,000*l.* cannot be deducted as claimed by the appellants, and accordingly, that this appeal fails and should be dismissed.

LORD SUMNER. My Lords, since the appellants have abandoned the point as to Mr. Fair's remuneration, there is only one point before your Lordships for decision—namely, whether the appellants are entitled to bring the sum of 30,000*l.*, no more, no less, into an assessment in all other respects duly made upon them, as a proper deduction before arriving at profits under the Acts relating to income tax and excess profits duty.

The business carried on by John Smith & Son is of a kind fairly familiar. The merchant who carries on such a business makes firm forward contracts for long terms to buy coal from collieries in periodic instalments and at fixed prices, generally f.o.b., and then, during the term, sells it at a better price, if he can, in greater or in less quantities, choosing his own time and employing his foresight, diligence, and business

connections. This system makes the colliery business less irregular and gives the managers a stable programme to work to; it secures to the merchant a fixed basis for a business, which in ordinary times is not very speculative and, during the war, turned speculation into a certainty "beyond the dreams of avarice." Such appears to have been the principal business of John Smith & Son in 1914 and 1915. There is, or was, a converse side, namely, to make forward contracts to supply bunkers to liners or coals to foreign railways and gasworks. Here the merchant must cover himself by current contracts with the pits, or to a less extent by buying parcels in the market. Furthermore, by buying f.o.b. and selling c.i.f., there is a chance of making something out of chartering and freights. Whether this business, either in the hands of the father or of the son, included the two latter branches, we do not know.

One thing, however, is clear. In such a business the colliery dispatches the coal by rail to the point of shipment alongside, and the middleman never sees the coal at all. Legally, no doubt, he acts as a conduit, through which the property in the coal flows from the pit to the consumer, but he is hardly conscious of it. He need never have any stock in trade. The balance sheet of this firm shows that all the chattels it had were worth only 30*l.* 4*s.* 6*d.*, and they were office chairs and tables.

Mr. Smith, the son, bought the business from those representing the estate of Mr. Smith, the father, of whom he was himself one. That he did so in accordance with the provisions of his father's trust disposition and settlement, made some years before, makes no difference, at least, none in his favour. The effect of what he did is plain. He bought a business and its assets at a valuation made in manner provided in the settlement. He bought no coals; the business had none, nor any stock in trade; nor did he acquire any stock in trade in any business sense of the term. He did not pay 30,000*l.*; he paid 27,745*l.* as the balance of an account, which showed 30,000*l.* as a fair valuation for the current contracts as between him and the representatives of the

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Lord Sumner.

estate, agreed to by both and debited on one side of the account. Whether the contracts so valued could have been sold to strangers for that sum we do not know. The valuers evidently had their doubts about it. He did not pay this sum as the consideration for an assignment of the benefit of these contracts to himself; he took no assignment. The contracts were presumably in the firm's name and were part of its assets. He acquired the business carried on by his father in that name and with it these assets, and in that capacity, no question being raised, he enjoyed the benefit of contracts to which he was not a party in name, and to which he was a stranger at the time when they were made.

In effect the father died with a number of unfulfilled contracts on his hands, which it had been his business to implement at a profit, and this was what, perhaps among other things, he was then engaged in doing. To the business of further working out these contracts his son succeeded by purchase. 30,000*l.* was the value of an important part of the subject-matter of the business, to use a neutral term. It is an accident that the last of the contracts expired during the accounting period. The business carried on was not that of buying and selling contracts, but of buying and selling coals, and the contracts, which enabled the seller of the coals to acquire the coals, were no more the subject of his trading as a stock in trade for sale than a lease of a brickfield would be the subject of a sale of bricks.

My Lords, *City of London Contract Corporation* v. *Styles* (1) was decided thirty-three years ago. It has never been questioned. It was expressly approved by the Court of Appeal in the *Alianza Case* (2), Collins M.R. greatly relying on it, and Stirling L.J. actually saying that effect could not be given to the argument for the company without departing from that decision. As your Lordships' House affirmed the decision of the Court of Appeal, expressing satisfaction with the reasons given in their judgments, (3) *City of London Contract Corporation* v. *Styles* (1) has virtually been approved

(1) 2 Tax Cas. 239.
(2) [1905] 1 K. B. 184, 193, 196.
(3) [1906] A. C. 18.

here. Even if I doubted it, which I certainly do not, I should follow it. Tax cases ought not to be unsettled.

That decision seems to me indistinguishable from the present case. There the taxpaying company was incorporated to buy as a going concern the business of a firm of contractors, who had been entirely engaged in executing some construction contracts still uncompleted. The company bought this business, including the benefit of these contracts, and proceeded with the execution of them. In the purchase price was included a sum, ascertainable if not ascertained, for their value. The company claimed that, before their profits from carrying out these contracts could be ascertained, there must be deducted whatever sum represented their value in the price paid for the contractors' business generally. They said, much as has been said in this case, that before profits can be made out of working a contract, the contract has to be got and the payment of its price is the root of the profits. The Court held that this sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business; the sum was not paid as an outlay in a business already acquired, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on. The same is true of the appellants. The whole price paid, in cash or in account, was a sum employed or intended to be employed as capital in the trade of the company, and therefore cannot be deducted in ascertaining profits for income tax or excess profits duty.

My Lords, much has been said as to the nature of capital and the right description of this sum of 30,000*l.*, assuming it to be capital. I neither think it necessary to attempt to define the term nor to select an appropriate adjective for it. Doubtless Mr. Smith would wisely provide for some replacement of his outlay before flattering himself that he had made this handsome profit, but we are dealing with a firm which, consisting as it did of one person only, was under no legal obligation to keep its accounts in any particular form or even to keep accounts at all. If he paid his taxes and paid his way and kept out of debt, it did not matter what he called

H. L. (Sc.) 1921 JOHN SMITH & SON v. MOORE. Lord Sumner.

the money with which he did it. The only question is whether he can claim to deduct this 30,000*l.* without making a deduction, which the law calls, in the language of the Income Tax Acts, a sum "employed as capital" in his trade, and without making a deduction from the profits or gains from his trade, "on account of diminution of capital employed." I think the answer is that he cannot, and so his appeal fails.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, April 12, 1921.

Agents for the appellants: *Ince, Colt, Ince & Roscoe, for Wright, Johnston & Mackenzie, Writers, Glasgow, and Arch. Menzies & White, W.S., Edinburgh.*

Agent for the respondent: *H. Bertram Cox, Solicitor for England of the Board of Inland Revenue, for Stair A. Gillon, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED . . } APPELLANTS;

AND

GAUNT . . . . . RESPONDENT.

H. L. (E.)* 1921 April 18.

Insurance (Marine)—Risk—Insurance against all Risks—Exceptional Damage to Goods—"Casualty"—Bales of Wool damaged by Wet—"Deck cargo"—Usage—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 30, *s.* 55, *sub-s.* 2 (*a*); *s.* 78, *sub-s.* 4; *Sch. I, r.* 17.

A plaintiff who sues in respect of a loss under an "all risks" policy must prove that the loss was due to an accident or casualty, but is not bound to prove the exact nature of the accident or casualty which occasioned his loss.

The provision in r. 17 of the Rules for the Construction of Policies in the First Schedule of the Marine Insurance Act, 1906, that "in the absence of any usage to the contrary" deck cargo must be insured specifically and not under the general denomination of goods does not alter the common law on the subject. Accordingly, the usage referred to is a usage of the carrying trade to which the insurance relates and not of the insurance market, and if there is established a usage of the carrying trade to carry any particular class of goods on deck the underwriters are deemed to be acquainted with such usage and are liable for the loss of deck cargo though unspecified.

Per Lord Sumner: Sect. 78, sub-s. 4, of the Marine Insurance Act, 1906, refers to suing and labouring, and cannot be read as meaning that if the agents of the assured are not reasonably careful throughout the transit he cannot recover for anything to which their want of care contributes.

Decision of the Court of Appeal [1920] 1 K. B. 903 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Rowlatt J. in favour of the appellants (the defendants) in an action on certain policies of marine insurance.

The respondent (plaintiff) was the purchaser of a portion of a clip of wool produced in Patagonia to be delivered in bales f.o.b. an ocean steamer at Punta Arenas, a port in Chile, and was the assignee of three policies of marine

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, and LORD SUMNER.

(1) [1920] 1 K. B. 903.

H. L. (E.) 1921

BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT.

insurance, whereby the wool in question was insured during the transit from the sheep's back in the interior to Punta Arenas. The wool was further insured by two other policies during the transit from Punta Arenas to England, but no question arose on this appeal as to those policies.

The respondent by his action claimed against the appellants under the three first-named policies for a partial loss in respect of these bales of wool.

It was agreed that the policies were to be read with a cover note in which the risk was described as "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and/or risks from the sheep's back and/or stations while awaiting shipment and/or forwarding and until safely delivered into warehouse in Europe with liberties as per Bills of Lading."

After the arrival of the wool in England it was discovered that some of the bales were badly damaged by water and it was proved at the trial that this damage arose during the transit to Punta Arenas. This transit was effected partly by land and partly by water in small local steamers, and to a large extent the wool was carried on the decks of the local steamers in accordance with the regular practice of the carrying trade in that district. The wool was then discharged on to hulks in the harbour of Punta Arenas to await shipment on ocean steamers.

The circumstances under which the damage arose are fully set out in the judgment of the Lord Chancellor.

The substantial questions raised by the appeal were (1.) whether the damage was due to a risk covered by the policies, or, in other words, whether it was due to a casualty; (2.) whether the wool, while carried on the deck of the local steamers, was removed from the scope of the policies on the ground that it was not specifically insured as deck cargo.

Rowlatt J. held that there was no evidence that the loss was due to accidental causes, and gave judgment for the appellants.

The Court of Appeal (Lord Sterndale M.R., Atkin L.J. and Eve J.) held (1.) that there was sufficient evidence to

show that the damage was caused by some fortuitous accident, and (2.) that upon any construction of r. 17 in the First Schedule to the Marine Insurance Act, 1906, the necessary proof with regard to the carriage of wool upon deck had been given. They accordingly gave judgment for the respondent for damages to be assessed by an official referee.

1921. Feb. 11, 17. *R. A. Wright K.C.* and *Le Quesne* for the appellants.

1. In order to recover under an "all risks" policy the assured must prove affirmatively some casualty or fortuitous occurrence. Exposure to ordinary atmospheric conditions is not a risk within the policy: *Schloss Brothers* v. *Stevens* (1); *The Xantho* (2); and see *Jacob* v. *Gaviller*. (3) The respondent has not shown how the loss occurred and he has failed to discharge the onus which lay upon him.

2. So far as the loss was caused by the omission of the assured or his servants to take precautions to protect the goods from wet the respondent cannot recover. This is shown by sub-s. 4 of s. 78 of the Marine Insurance Act, 1906. The sub-section says that "it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss." That sub-section is not necessarily limited to suing and labouring, but can be construed as laying down a general rule consistently with s. 55, sub-s. 2 (*a*). It contains words apt to give effect to the principle established by *Currie* v. *Bombay Native Insurance Co.* (4); and see *Kidston* v. *Empire Marine Insurance Co.* (5) and *The Pomeranian*. (6)

3. Some of the wool was carried on the deck of the local steamers, but this fact was not disclosed to the appellants and such wool was never specifically insured as deck cargo. Sect. 30 of the Act of 1906 refers to Sch. I., which sets out

(1) [1906] 2 K. B. 665, 673.
(2) (1887) 12 App. Cas. 503, 509.
(3) (1902) 7 Com. Cas. 116.
(4) (1869) L. R. 3 P. C. 72.
(5) (1866) L. R. 1 C. P. 535, 544.
(6) [1895] P. 349, 352.

H. L. (E.) 1921 BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT.

a form of policy and gives rules for the construction of policies. By r. 17, in the absence of any usage to the contrary, deck cargo must be insured specifically and not under the general denomination of goods. The usage to the contrary there mentioned must refer to the usage of the insurance market. An underwriter who insures goods prima facie insures goods carried under deck because that is the only way to carry goods safely. Before the passing of the Marine Insurance Act, 1906, the usage of the carrying trade was sufficient, because knowledge of that usage was imputed to the underwriter. But the words " usage to the contrary " must mean a usage to do something to the contrary of what is defined by the rule, and upon the evidence it is impossible to find a usage in the insurance market to insure these goods when carried on deck unless specifically described as deck cargo. The distinction is not a new one and is discussed in Phillips on Insurance, § 460.

MacKinnon K.C. (*Sir John Simon K.C.* and *R. I. Simey* with him) for the respondent.

[LORD BIRKENHEAD L.C. We wish to hear you mainly upon the question of the construction of r. 17.]

Upon a fair construction of the rule deck cargo must be so described unless there is a usage of the carrying trade to carry the goods on deck. The rule was not intended to alter the common law on the subject. But even if it be necessary to show a usage on the part of underwriters so to insure goods which by the custom of the carrying trade had been carried on deck the respondent still succeeds. Upon any construction of usage, on the evidence in this case the respondent is entitled to recover.

Le Quesne added nothing in reply.

The House took time for consideration.

1921. April 18. LORD BIRKENHEAD L.C. (read by VISCOUNT FINLAY). My Lords, this is an appeal from an order of the Court of Appeal reversing a judgment of Rowlatt J. in favour of the appellants in an action brought

against them by the respondent in respect of a partial loss by damage to wool insured with the appellants.

The wool in question was produced in Patagonia by the Sociedad Explotadora del Tierra del Fuego. The respondent, by direct and sub-purchases had acquired part of the 1916–17 clip under four contracts all of which were on the terms f.o.b. Punta Arenas. The insurance up to delivery on ocean steamer at that port was to be effected by the Explotadora Company and after such delivery by the purchaser, but no question now arises as to the insurance of the risks of ocean transit.

The policies sued upon were taken out by the Explotadora Company and by them assigned to the respondent after the wool had reached his mills at Bradford and a few days before the writ was issued. These policies have been modified so as to carry out the terms of a general cover note dated March 15, 1916, and must therefore be read as containing a clause to this effect: "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water, and all risks from the sheep's back and/or station, while awaiting shipment and/or forwarding and until safely delivered . . . . with liberties as per bill of lading."

The wool reached Bradford in a damaged condition. The evidence did not establish with any certainty when or how the damage was done, but made it clear (and Rowlatt J. so held) that it occurred at some period between the shearing of the sheep and shipment at Punta Arenas; that is to say, during the period covered by the policies issued by the appellants.

The evidence proper to be considered may be shortly collected:—

During the summer of the Southern Hemisphere, when the weather is generally dry but windy, the sheep are sheared at the various stations. The wool is then compressed into bales, covered and bound with steel or iron bands and placed in store until taken to the coast (when the station is not at the shore) by tractors or wagons. The bales reach the coast during the summer season and, while awaiting

H. L. (E.) 1921 BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT. Lord Birkenhead L.C.

shipment to Punta Arenas, are stored. There are at all the coast ports or stations sheds of sufficient capacity except at Puerto Prat. At this port, on occasions when the storage capacity proves inadequate, bales are stored on the beach in the open. They are piled in tiers on timber baulks under tarpaulins, which are not always efficiently used. There was some evidence that bales so lying in the open are sometimes sprayed during unusually high tides. The voyage to Punta Arenas is by small local steamships which have a low freeboard, and the ships' log books while this wool was in transit show that there was at times bad weather and rain. The owners of these vessels claim the right to carry wool on deck and have in fact always carried it. The manifests show that some of the bales were wet when taken on board. On arrival at Punta Arenas there is generally a delay before the wool can be received on the ocean steamers, and this delay was at the relevant period increased by shortage of available tonnage. The practice where delay occurs is to store in hulks, but owing to congestion a great deal of wool was, at the period in question, stored in the open.

The general manager of the Explotadora Company gave evidence that he could not recall a serious claim in respect of damage to wool occurring during the transit to Punta Arenas, and that the statements in the manifests of the local steamers showed that something abnormal had occurred. The mates' receipts and bills of lading issued by the ocean steamers contain notes that a number of bales were wet; and the oral evidence was to the effect that the wool was damaged before it was taken on board the ocean steamers. There was no evidence as to any particular bale or bales or as to the exact circumstances or cause of the damage.

In construing these policies it is important to bear in mind that they cover "all risk." These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. There is little authority on the point, but the decision of Walton J.

in *Schloss Brothers* v. *Stevens* (1), on a policy in similar terms, states the law accurately enough. He said that the words "all risks by land and water" as used in the policy then in question "were intended to cover all losses by any accidental cause of any kind occurring during the transit. . . . . There must be a casualty." Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.

Rowlatt J. accepted this view, but was of opinion that the evidence proved a state of facts which was consistent with the damage having occurred "without the intervention of anything fortuitous, of anything accidental, or of anything which could be called a casualty within the meaning of an insurance contract." I agree with the criticism of the Master of the Rolls upon this finding. The damage proved was such as did not occur and could not be expected to occur in the course of a normal transit. The inference remains that it was due to some abnormal circumstance, some accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss. In this case the respondent established that the loss must have been due to some casualty, and consequently the judgment of the Court of Appeal upon this point is right.

A further point arises—namely, whether the policies insure such part of the wool as was carried on deck, the appellants urging that some at least of the bales were damaged whilst being so carried.

There is, it is true, evidence suggesting that some of the

(1) [1906] 2 K. B. 665, 673.

H. L. (E.) 1921 BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT. Lord Birkenhead L.C.

damage occurred in the case of bales carried on deck, and the appellants rely on the seventeenth Rule of Construction in the First Schedule to the Marine Insurance Act, 1906, which applies to this policy by virtue of s. 30, sub-s. 2, of that Act. The latter part of the rule reads: "In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods."

It was proved that the Explotadora Company were aware of a practice of carrying bales on deck and, in fact, had complained; but the owners meeting this protest with an assertion of right, it was not persisted in. There was certainly a usage in the trade to carry on deck. Nor in my view did the rule under consideration make any change in the law as it existed when the Act was passed. Deck cargo and living animals must be insured as such. The policy, in other words, must contain words which inform all interested parties that the goods insured are to be carried on deck in the one case or are living animals in the other, unless there is a "usage to the contrary."

It was contended for the appellants that the "usage" contemplated by the rule was a usage in the insurance business as to the description for the purposes of insurance. This cannot be so. In the first place this construction would involve such a departure from the principles of law existing when the Act was passed that we ought not to so construe the words unless such an alteration was most plainly intended; secondly, inasmuch as an insurer is bound to know the usages of trade, if a usage exists in the trade to carry goods of a particular kind on deck, he knows that such goods are likely to be so carried, and there is little reason for requiring a specific statement that such a method of carriage will or may be employed. The "usage," therefore, must be a trade usage, and it was abundantly established in the case which your Lordships are considering. There was, therefore, no need to insure the wool specifically as deck cargo, and the omission to do so does not afford any defence to the appellants.

For these reasons I am of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, this appeal relates to the question of the liability of the appellants upon policies covering wool from various stations in Tierra del Fuego and on the mainland of Patagonia to Punta Arenas, the port of embarkation for Europe. The wool arrived in this country in a damaged condition. An action was brought upon policies covering the wool on the ocean voyage from Punta Arenas, and in that action it was held that the underwriters were not liable for the damage upon the ocean policies, and there is no appeal from that decision.

The present appeal relates to policies of insurance from the sheeps' backs at several stations to the ocean steamers at Punta Arenas. Rowlatt J. held that the plaintiffs in the present action failed to establish any right to recover on these policies. The damage was by wet, and the learned judge was of opinion that there was no evidence of any casualty causing the wetting so as to make the policy attach. The Court of Appeal, on the other hand, held that the circumstances show that the loss was covered by the terms of the policy as resulting from some casualty, and gave judgment for the plaintiffs, the amount to be assessed by a referee. The amount has been assessed at 19,125*l.* 13*s.* 11*d.* The insurance company on this appeal ask that the judgment of Rowlatt J. in their favour should be restored.

The wool had to be conveyed from a number of sheep stations to Punta Arenas, partly by land, and partly by water in coasting vessels. The insurances are to be read as containing the following clause: "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and all risks from the sheep's back and/or station, while awaiting shipment and/or forwarding and until safely delivered into warehouse in Europe, with liberties as per Bills of Lading."

I take this clause from the Letter of Cover of March 15,

H. L. (E.) 1921

BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT.

Viscount Finlay.

1916, it being admitted that the policies are to be read as containing a clause to this effect.

The bales of wool, on arrival at Bradford, were found to be seriously damaged by water, and the action was brought. A commission was issued to Punta Arenas, and the evidence taken on commission and at the trial left no doubt in the minds of the Court of first instance and of the Court of Appeal that the wetting took place after shearing and before the bales were put on board of the ocean steamer at Punta Arenas. There was no specific evidence to show how the wetting had taken place. Rowlatt J. held that the whole of the evidence was consistent with the goods having been injured "without the intervention of anything fortuitous, of anything accidental or of anything which could be called a casualty within the meaning of an insurance contract." He repeated the ratio decidendi of his judgment in another sentence near the end: "It seems to me that the policy insures the assured only against risks and any evidence which does not show that the damage was due to something fortuitous does not support the case when the underwriters are sued."

The evidence showed that the wool was made up into bales at the stations and that these bales were carried down to the place of embarkation on the small coasting steamers by which they were carried to Punta Arenas, where they were stored in hulks until embarkation could be made upon the ocean steamers.

No details were available as to the transit of particular bales, but the Master of the Rolls in his judgment in the Court of Appeal thus summarises the evidence (1): "It was, however, proved that the logs of the small steamers showed bad weather and rain at times, and that some bales shipped on them about this time were wet and also that some of these bales received on board the ocean steamers were stated in the mates' receipts and bills of lading to be wet and damaged. It was also proved that sometimes there was not room in the sheds for all the wool accumulated for

(1) [1920] 1 K. B. 907, 908.

shipment on the river steamers, and that some had to be piled outside the sheds, where tarpaulins were provided but not always effectively used. Evidence was also given that bales sometimes got wetted with salt water by an unexpectedly high tide while piled on the beach, and also by spray coming over them when carried on the deck of the river steamers. Evidence was given that part of the wool was always carried on deck. Great congestion prevailed at this time because of the difficulty in obtaining transport, with the result that the storage places were overcrowded and some of the wool had to be stored outside. Mr. Burbury, the manager of the Explotadora, stated that in his experience of the carriage of wool, extending over many years, he could not remember any case of a serious claim in respect of damage arising during the transit from the stations to Punta Arenas, and that the statements in the logs and mates' receipts indicated that something abnormal had happened. The chief officer of one of the ocean steamers also gave evidence that the part of these bales which he received was the worst cargo he had ever seen."

The Master of the Rolls proceeded to state the risks insured against, and referred to the decision of Walton J. in *Schloss Brothers* v. *Stevens*. (1) That was the case of a policy somewhat similar to that in the present case, and Walton J. said: "I think they" (the words of the clause) "were intended to cover all losses by any accidental cause of any kind occurring during the transit. Does the loss suffered in fact come within that category? Was the damage from some accidental cause? There must be a casualty."

The Master of the Rolls said that in the present case there was exceptional damage such as did not arise under the normal conditions of such a transit, and that in his opinion it might be inferred that it proceeded from a casualty or something accidental. With reference to the judgment of Rowlatt J. he remarked (2): "I think he treated the policies

(1) [1906] 2 K. B. 665, 673. (2) [1920] 1 K. B. 910.

H. L. (E.) 1921 BRITISH AND FOREIGN MARINE INSURANCE Co. v. GAUNT. Viscount Finlay

too much as being against the specific perils in which it is necessary to prove specifically that the loss came within one of them, and did not give sufficient attention to the fact that these were policies of an unusual kind against all risks, and that it was sufficient to show that the loss was occasioned by a casualty or something accidental without proving further in what the exact nature of that casualty consisted."

I agree with the Master of the Rolls in thinking that there was sufficient evidence to justify the inference that this loss was due to something accidental. Of course, no one would contend that a policy of this kind would cover ordinary wear and tear or deterioration incidental to the transit of goods. There must be something in the nature of an accident to bring the policy into play. But I can find no justification for the contention which the appellants put forward at the bar of your Lordships' House that in order to recover upon such a policy for damage resulting in the goods getting wet by rain it would be necessary to establish that there was an extraordinary or unusually heavy fall of rain. It would be quite enough if owing to some accidental circumstances the goods were left uncovered when rain was falling. This might happen by some want of care on the part of the men whose duty it was to keep the goods covered with the tarpaulins which were provided for the purpose. If, from any of the accidental circumstances which are incident to a journey, the goods are damaged by a risk covered by a policy, the element of casualty or accident is supplied. There is nothing in the present case to show that the damage was due to any wilful misconduct on the part of the assured. As Atkin L.J. put it in his judgment, I think that the facts show that the wetting might probably be caused by some fortuitous accident or casualty.

I agree with this finding. This disposes of the main question on this appeal. There is, however, another point to be dealt with.

The appellants allege that some part of the bales were

damaged while being carried as deck cargo on board the coasting steamers, and that the policy does not cover deck cargo.

They rely for this purpose on the Marine Insurance Act of 1906, s. 30, and the seventeenth of the Rules of Construction in the schedule.

Sect. 30 is as follows: "30.—(1.) A policy may be in the form in the First Schedule to this Act. (2.) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them."

The seventeenth of the Rules for Construction is as follows: "17. The term 'goods' means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods."

The construction of this rule has given rise to a great deal of controversy, and it is now necessary that we should endeavour to settle this vexed question of construction. Rule 17 is very oddly worded, but it appears to me that on its true reading it leaves the law as to insurance of deck cargo very much as it was before the Marine Insurance Act passed.

The rule prescribes that deck cargo and living animals must be insured specifically in the absence of any usage to the contrary. What is the meaning of the provision that deck cargo and living animals "must be insured specifically"? I think "specifically" in this connection means "as such." In the case of deck cargo there must, in addition to the ordinary description of the goods, be an intimation in the policy that the goods are to be carried on deck, by inserting "for carriage on deck," or other similar words. In the case of "living animals" the description must convey an intimation that the animals

H. L. (E.) 1921

BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT.

Viscount Finlay.

are alive and not mere carcases, that is, if there is any ambiguity in the description there must be added to it the word "live," or some equivalent expression.

There are, of course, special risks attaching to deck cargo and to live animals, and the rule is, I think, intended to secure that the underwriter must have express information of the existence of such risks "in the absence of any usage to the contrary."

What is the meaning of these words as to usage which are prefixed to the second part of r. 17? In the case of deck cargo, I think that these words would be satisfied by proof of a usage in a particular trade, or generally, to carry on deck goods of a particular kind. The underwriter is bound to know of the existence of such usages, and the description of particular goods as of the class to which such a usage applies gives him the information that the goods will or may be carried on deck. If there is such a usage there is no reason for requiring a statement that goods which fall within it are, in fact, to be carried on deck, as the mere description of the goods gives the necessary intimation. Such a usage may be fairly described as "a usage to the contrary." I cannot adopt the appellants' contention that the usage must be a usage not in the carrying trade with regard to such goods, but in the insurance world with reference to the manner in which they are to be described for insurance purposes. Such a usage as to insurance may, of course, grow up in any trade in which deck carriage of certain articles prevails, and if such a usage in the business of insurance has grown up it will be a usage to the contrary. But in my opinion no such usage in the business of insurance is necessary to dispense with the specific description of deck cargo as such. Any such construction of r. 17 would bring it into acute conflict with the law as to insurance of deck cargo as it existed up to 1906, and is not, in my opinion, warranted by the wording of the rule.

In the case of "living animals" the words "in the absence of any usage to the contrary" may have been introduced to guard against the conceivable case that in a

particular trade in which the goods carried were almost exclusively live cattle or sheep there might be a usage that such live stock should be merely described as "goods." The contingency is not a very probable one, but Parliament, if it considered the wording of this rule, may have thought that to provide against any possible usage to the contrary could do no harm and might conceivably be useful.

The concluding words of the paragraph that deck cargo and live stock are not to be insured simply as goods appear to be quite unnecessary, but do not militate against the construction of the paragraph which I am disposed to adopt.

As both the Master of the Rolls and Atkin L.J. point out, there was abundant evidence of a usage that in this trade bales of wool should be carried on deck. The "usage to the contrary" was therefore established, and there was no necessity to ensure the bales specifically as for carriage on deck.

Upon the whole I think that the appeal should be dismissed with costs.

VISCOUNT CAVE. My Lords, I agree and have nothing to add.

LORD ATKINSON. My Lords, I agree.

LORD SUMNER. My Lords, with one exception mentioned later on I concur in the conclusions drawn from the evidence by the Court of Appeal. The damage was fresh-water damage; it occurred after the winter rains had begun. There is some evidence that bales are exposed to rain at Puerto Prat, when the sheds are full, and on the decks of the coasters, where it is proved to be the usage to carry such cargo as this, and on the hulks at Punta Arenas. It is proved that tarpaulins are provided by the shippers at their sheds and that their men sometimes neglect to use them. On coasters and hulks tarpaulins ought to be at hand and used, and it is not shown that either were

H. L. (E.) 1921 BRITISH AND FOREIGN MARINE INSURANCE Co. v. GAUNT. Lord Sumner.

unseaworthy for want of them. Proper tarpaulins properly used would protect the wool from damage by rain. Evidently a substantial amount of the damage was done while the goods were on deck and would have been prevented if proper care had been used.

The perils insured against in the printed form of policy are enlarged by those in the cover notes, "including all risk of craft, fire, coasters, hulks, transhipment, and inland carriage by land and/or water, and all risks from the sheep's back and/or station, while awaiting shipment and/or forwarding. . . . ." Both clauses therefore, the additional clause as well as that in the regular form, describe risks or perils intended to be insured against: *Nigel Gold Mining Co.* v. *Hoade* (1); *Jacob* v. *Gaviller*. (2) The words closely resemble those in *Schloss Brothers* v. *Stevens* (3), where Walton J. refused to read "all risks by land and by water" as limited to the risk peculiarly incidental to carriage in a ship, in boats or in craft, and held that it "must be read literally as meaning all risks whatsoever." There is nothing abnormal in this; in fact, "against all risks whatsoever, anything printed or written herein to the contrary notwithstanding" was a clause known in practice over thirty years ago, and a great variety of clauses in policies on cattle, employing the words "all risks," "all risks of mortality," and "all risks of mortality . . . . from any cause whatsoever" may be found by the curious in Sir Douglas Owen's Marine Insurance Clauses. "There must be a casualty," added Walton J.; the words were "intended to cover all losses by any accidental cause of any kind occurring during transit." The appellants argue that getting wet, when not under cover, is a thing that will happen to bales, whenever it rains and the injured bales started on their journey after the rainy season had begun; in a word they say, the loss arose from "no unusual cause": *Dudgeon* v. *Pembroke*. (4) It is, however, to be remembered that discussions about wear and

(1) [1901] 2 K. B. 849; 6 Com. Cas. 268.
(2) 7 Com. Cas. 116.
(3) [1906] 2 K. B. 665, 673.
(4) (1874) L. R. 9 Q. B. 581, 594; (on appeal (1875) 1 Q. B. D. 96).

tear and leakage and breakage generally arise when the issue is whether the loss is or is not a loss by perils of the sea—e.g., in *Rohl* v. *Parr* (1), *Hunter* v. *Potts* (2), and *Merchants Trading Co.* v. *Universal Marine Insurance Co.* (3), where Lush J. observes "the silent natural action of the water on a floating body is not a peril of the sea, but it is wear and tear." The more widely the category of perils insured against is extended, the more nearly is it true to say that not only perils of the sea but perils on the sea are insured. "All risks" has the same effect as if all insurable risks were separately enumerated; for example, it includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of the loss by wetting. It appears to be what happened. For wool to get wet in the rain is a casualty, though not a grave one; it is not a thing intended but is accidental; it is something which injures the wool from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

There are, of course, limits to "all risks." They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description "all risks" does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils.

I think, however, that the quasi-universality of the

(1) (1796) 1 Esp. 444.
(2) (1815) 4 Camp. 203.
(3) (1870) 2 Asp. M. C. (N. S.) 431*n.*, 432.

H. L. (E.) 1921 — BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT. — Lord Sumner.

description does affect the onus of proof in one way. The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that it is not by something else. When he avers loss by some risk coming within "all risks," as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, so as to show exactly how his loss was caused. If he did so, he would not bring it any the more within the policy. These considerations answer the appellants' complaint, that the plaintiffs were meagre with their proof. So they were, but it was enough for them to prove some casualty insured against. Rowlatt J., as I venture to think, attached too much importance to the absence of any kind of marine disaster. If the casualty was fortuitous, it needed not to be a calamity.

As a good deal of the damaged cargo was on deck there arises for decision a point upon the Marine Insurance Act, which was strongly pressed upon your Lordships. The First Schedule sets out a Lloyd's form of policy and a series of rules for its construction "where the context does not otherwise require," and, out of seventeen following rules, in all but one the meaning of some particular term is expounded. The schedule in fact contains a typical document with an elaborate interpretation clause. I can conceive no subject on which the Legislature is less likely to have wished to make a change or to declare that what people have hitherto meant in business shall be their meaning no longer. Theretofore all concerned, when they said "goods" simply, meant goods under deck or goods in and over all according as the usage of the trade, in which the goods were to be carried, did not or did include a usage to carry on deck. Why should a Codification Act abolish that habitual meaning and make the word mean the one or the other according as there is or is not a drafting usage among those who prepare and those who sign

policies? No one has suggested any reason for such a change.

My Lords, even if the schedule has changed the law, does it affect this case? Sect. 30, sub-s. 2, is an interpretation section. It says "the terms and expressions mentioned in Schedule I. shall be construed as having the scope and meaning in that schedule assigned to them." Now this policy, as expanded by the covers, does not contain any term or expression mentioned in art. 17 of Schedule I; it says, "wool," "wool clips" or "bales of wool," not deck cargo or cargo or goods. Next, the rule does not apply "except where the context does not otherwise require." Now the form is for a voyage in a named ship, "beginning the adventure upon the said goods, from the loading thereof aboard ship," but the context consists of additional words, which make the adventure begin from the sheep's back and continue by land and/or water in coasters and hulks and while awaiting transhipment. I greatly question, if this context does not require something different from the mere insurance of deck cargo specifically. In any case, if this rule of interpretation is new, the appellants find considerable difficulty in making it apply to this policy on any strict construction, and unless the construction is to be very strict, there is no ground for questioning that the rule is not new but only embodies the existing law. This cargo is insured specifically, for it is described as "wool clips" and "bales of wool." To say that it is not insured specifically, though it is described specifically, unless it is insured as on deck however described, conflicts with the rest of the sentence. Clearly living animals have to be insured specifically as living animals and not under the general denomination of goods. From the specific description the underwriter must take notice of the place of stowage, where a usage as to the place of stowage of such goods is, or is deemed to be, known to him.

Then there are the words "in the absence of any usage to the contrary." Rule 17 is a direction as to the apt mode of drawing up a policy, that is, primarily as to the use of

H. L. (E.) 1921 — BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT. — Lord Sumner.

words. The rule in construing and therefore in drawing contracts is that the words must be understood with reference to the circumstances in the light of which the parties contract. When there is a usage to carry all or any goods on deck, which both parties know or are deemed to know, their words may be selected and will be construed with reference to it. In such circumstances even a general word, "goods," will derive its meaning from the usages of the carrying trade known to the contracting parties, just as much as from any usage, known to both, as to the meanings of terms in the general vocabulary of commerce. Now the word "usage" is not expressly limited and a usage to carry on deck is a usage like another; only the context, therefore, can restrict it to a usage of drafting policies. What is that context? Goods on deck are still "goods" and "goods" are specifically described for insurance, when the policy says what they are specifically. It is not a specific description to say where they are. So much for mere language. What makes "goods" insufficiently specific for an insurance on deck cargo is not any usage of underwriters to use words in a technical sense but the usage of carriers to stow goods under deck, as being the safest place. A usage to carry on deck is a usage to the contrary of that, and therefore, where it exists, its presence prevents any misdescription from arising. If in all carrying trades cargo was carried in and over indiscriminately, no one would ever have distinguished between one position and the other any more than between one hold and another. No doubt, if ever a usage arises among those who draw and sign and accept policies to mean by "goods" any kind of goods, stowed anywhere, that also might be proved as a "usage to the contrary," but the respondent's point here is not that the "usage to the contrary" can never be such a usage as the appellants say it must be, but that it is not exclusively so, for a usage to carry on deck is also a usage to the contrary. For my part I think them right.

My Lords, perhaps I might venture to say that in this article the Legislature has used language to express its

thoughts with less than its accustomed felicity, but I think that there are special reasons to explain this. It may easily happen to any one who endeavours to crystallise in a sentence the language of a century's decisions to draw the line somewhat uncertainly between the usual mode of carrying particular goods and the usual meaning of or description of those goods in a policy. In Lord Mansfield's time goods on deck were said not to be covered by a policy "on goods," because, in the language of insurance, goods only meant goods which were merchantable and a part of the cargo. Hence a captain's effects and goods lashed on deck were not covered. Apparently (though not quite certainly) the objection, that the goods lashed on deck were not covered by the description "goods," rested on the fact that they were on deck and so not part of the cargo, which normally would be under deck, and not on the fact that they were not merchandise but were the master's own effects: *Ross* v. *Thwaite*. (1) In 1802 the opinion was clearly expressed that goods on deck were not within the description of goods in the policy: *Backhouse* v. *Ripley*. (2) Lord Ellenborough held in 1815 that underwriters were bound to take notice of a usage to carry carboys of vitriol on deck "without any communication," and so a policy on carboys of vitriol covered them on deck: *Da Costa* v. *Edmunds*. (3) In the general usage of the carrying trade, goods were only properly stowed when stowed under deck, but when, by a particular usage of a particular trade or referring to particular goods, they were properly stowed though stowed on deck, the underwriter must be taken to know it as part of his business equipment and to contract to insure goods in that trade or of that description with reference to the usage. Subsequent authorities develop this view. Evidence of a usage of underwriters not to pay for boats when slung on the quarter, though the policy was on "ship, boat and other furniture," was held inadmissible as contradicting the express language of the policy:

(1) (1776) 1 Park., 8th ed., 23. (2) (1802) 1 Park., 8th ed. 24.
(3) (1815) 4 Camp. 142.

H. L. (E.) 1921

BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT.

Lord Sumner.

Blackett v. *Royal Exchange Assurance* (1); and *Ross* v. *Thwaite* (2) was explained by Lord Lyndhurst C.B. upon the view, that by an implied term of the policy the underwriter is liable for goods insured only when so carried as to be exposed to ordinary and not to extraordinary and uncommunicated perils. Hence "an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy." In commenting on this case in *Myers* v. *Sarl* (3), Cockburn C.J. says that it goes to the verge of permissible exclusion of evidence and that *Ross* v. *Thwaite* (2) and *Backhouse* v. *Ripley* (4), cases which had never been questioned, showed that by usage the general terms in the policy had received a limited signification. In the same case Blackburn J. considered that Lord Lyndhurst meant, that taking the language of the whole contract, it evinced upon the face of it an intention not to use the phrase in question in the particular sense sought to be put on it. In substance this was the view adopted in *Miller* v. *Titherington* (5), briefly affirmed in the Exchequer Chamber (6), where on demurrer a plea of a custom of Liverpool underwriters not to pay for general average on timber jettisoned from deck was sustained on a declaration on a Liverpool policy upon ship. It was pleaded as a custom in the North Atlantic timber trade that underwriters were not liable under such circumstances, as both assured and underwriter well knew when they entered into the contract, and Martin B. assigns as the reason for his decision, that *Blackett's Case* (1) is really an illustration of the rule first recorded in *Ross* v. *Thwaite* (2), and that in such cases words are used in particular trades in a particular sense, which the parties may prove by evidence.

As far as I know, questions relating to insurance on deck

(1) (1832) 2 C. & J. 244, 249, 250.
(2) 1 Park., 8th ed., 23.
(3) (1860) 30 L. J. (Q. B.) 9, 13, 15.
(4) 1 Park., 8th ed., 24.
(5) (1861) 30 L. J. (Ex.) 217, 221.
(6) (1862) 31 L. J. (Ex.) 363.

cargo in actions on a policy for loss of the cargo by perils insured against did not come up for any considerable amount of further discussion in this country till 1903, the propositions laid down in the 2nd edition of Arnould on Marine Insurance (i., 263) being generally accepted—namely: "goods carried on deck, as they are exposed to a greater hazard than goods carried in the ordinary way, are not covered by a general insurance in the common form on goods and merchandize; if, indeed, they are so carried by virtue of any general and well known custom of the particular course of trade on which the insurance is effected, the underwriter is presumed to be acquainted with such usage, without having notice of it, and therefore may fairly be supposed to undertake the risk of their being so carried on deck." In 1903 Walton J. reviewed the subject in a remarkable judgment (*Apollinaris Co.* v. *Nord Deutsche Insurance Co.* (1)) and stated these conclusions: "Where from the description of the goods or the voyage, or both, it is apparent that, in accordance with a well known practice or usage of trade, the goods will or even probably may be carried on deck, then even in the case of voyages by sea, where goods so carried are necessarily exposed to peculiar dangers, still the underwriters will be deemed to have consented to take this risk and will be liable for any loss of deck cargo by perils insured against." . . . . "The rule against carrying goods on deck is really involved in and depends on a larger and wider rule, which is that goods carried on a vessel should not be stowed so as to be exposed to unnecessary and extraordinary peril during transit."

The result would appear to be as follows:—

(1.) In the absence of proof of a special meaning attaching to the word used, and of contracting with reference to that meaning, anything coming under the description of the subject-matter of insurance, which is expressed in the policy, is covered; but (2.) there is an implied exception from the liability of the underwriter, that he does not cover losses, where they are caused by exposure of the subject-matter,

(1) [1904] 1 K. B. 252, 258, 260.

H. L. (E.) 1921 BRITISH AND FOREIGN MARINE INSURANCE CO. v. GAUNT. Lord Sumner.

by those in charge of the adventure, to extraordinary perils of which the risk of deck carriage is one. (3.) If the underwriter knows by the special description employed or otherwise, or if he is deemed to know it without notification because of the existence of a usage in the carrying trade to which the insurance refers, that the goods may be carried on deck, his contract is taken to assent to that mode of stowage, and then either he agrees to cover such extraordinary perils or they cease to be extraordinary and so are covered. The important thing to notice is that the usage in question is a usage of the carrying trade to do a certain thing and is not a usage of the business of insurance to attach a special meaning to a particular term, or to recognize a special liability in certain circumstances though only general terms are used. Such, I think, was the law before it was codified by the Act of 1906, and such, in my opinion, it remains. The particular wording of art. 17 obviously is not that which would have been adopted if totally new legislation was being framed. It takes its colour from the decisions, and reference to those decisions shows how the article came to be framed as it was. I think that it makes no change in the law.

My Lords, the fact which I am not able to find established in the evidence as the Court of Appeal found it is the existence of a custom of underwriters to insure wool on deck during this transit under general terms not specifying that it may be stowed on deck. There was no evidence of actual knowledge that wool was ever carried on deck so far as the defendants were concerned, and their underwriter denied it. There was none of general knowledge of the practice and there was evidence to the contrary. True the cover was many years old and had been annually renewed, but no claims were proved to have been made and paid on the footing of the wool being carried on deck. A man may know that in some instances his cargo is being put on deck without this being evidence against him of a usage to carry on deck, for he may be relying on his right to claim damages for improper stowage if any harm is done. So these

underwriters may have renewed the cover annually, relying on their not being on the risk except for under-deck cargo. If so, the renewal of the insurance does not show that they used general terms to cover the cargo whether on deck or not. To make them liable there must be proved in fact a usage to carry on deck, which they are deemed to know, and then a liability arises in such circumstances in respect of deck cargo though unspecified.

There remains an argument based on a reading of s. 78, sub-s. 4, of the Act which is very novel. It is one of the disadvantages of codification that new terms used or even unfamiliar sequences of propositions suggest that the law has been changed, where those familiar with the old decisions would not have suspected it. The argument affords a striking instance of this. The section obviously refers to suing and labouring. It cannot possibly be read as meaning that if the agents of the assured are not reasonably careful throughout the transit he cannot recover for anything to which their want of care contributes. The point therefore fails.

My Lords, I think the appeal should be dismissed.

Order of the Court of Appeal affirmed, and Appeal dismissed with costs.

Lords' Journals, April 18, 1921.

Solicitors for the appellants: *Waltons & Co.*
Solicitors for the respondent: *Ballantyne, Clifford & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1921 *May 2.*

GLEBE SUGAR REFINING COMPANY, LIMITED, AND OTHERS . . . . . } APPELLANTS;

AND

TRUSTEES OF PORT AND HARBOURS OF GREENOCK . . . . . } RESPONDENTS.

Harbour—Statutory Powers and Obligations of Harbour Trustees—Lease by Trustees of a graving Dock forming Part of statutory Undertaking—Ultra vires—Greenock Port and Harbours Consolidation Act, 1913 (3 & 4 *Geo. 5, c. xlii.*), *s.* 109—*Harbours, Docks and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *s.* 23.

By s. 23 of the Harbours, Docks and Piers Clauses Act, 1847, "the undertakers may lease . . . . any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the special Act, at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the persons taking the same, provided that no such lease be granted for a longer term than three years":—

Held, that the words "other conveniences" were not to be confined to works or things ejusdem generis with those specifically mentioned in the section and that they included a graving dock.

Where, therefore, harbour trustees constituted under a special Act, which (with some immaterial exceptions) incorporated the Harbours, Docks and Piers Clauses Act, 1847, in supposed exercise of the powers conferred upon them by the special Act, leased to two shipbuilders a graving dock, which formed part of their statutory undertaking, and which, upon the construction of the special Act, was held to be provided by the trustees for the purposes of that Act, for a period of ten years:—

Held, that the lease was void as contravening the provisions of s. 23 of the Act of 1847.

Interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland reversed.

APPEAL against interlocutors pronounced by the Lord Ordinary (Lord Hunter) and the First Division of the Court of Session in Scotland.

The facts, which are fully stated by the Lord Chancellor in his judgment, may be shortly summarized as follows: The appellants were sugar refiners carrying on business at

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

Greenock and in connection with their business they had occasion to resort to and use the port and harbours of Greenock.

The respondents were the trustees of the said port and harbours, incorporated by the Greenock Port and Harbours Consolidation Act, 1913, and under that Act were vested with the management and control of the undertaking.

The statutory undertaking included (inter alia) three graving docks, of which the largest and most modern was the Garvel Graving Dock, and this was the only graving dock which was capable of being used by modern freight steamers.

By a minute of lease dated September 3 and 5, 1918, the respondents, in supposed exercise of their powers under the said Act, leased to two shipbuilders of Glasgow, first, the said Garvel Graving Dock and the appurtenances thereof, and, second, 2000 square yards of ground adjoining the dock, for a period of ten years at a rent of 4500*l.* per annum for the dock and ground, with an option in certain events of extending the lease for a further period of ten years at the same rent.

In February, 1919, the appellants brought an action against the respondents and the lessees for (inter alia) the reduction of the lease, in so far as it comprised the graving dock, as being ultra vires of the trustees. The lessees, however, entered no defence to the action.

The appellants rested their case solely upon the construction of the special Act. This Act incorporated the Harbour, Docks and Piers Clauses Act, 1847 (with certain exceptions not material to the question at issue), but no reference was made to the general Act in the Court of Session.

The Lord Ordinary dismissed the action as irrelevant upon the ground that s. 109 of the Act of 1913 conferred wide discretionary powers upon the trustees and covered the granting of a lease of a graving dock for a period of years, and the First Division (the Lord President (Lord Strathclyde), Lord Mackenzie, Lord Skerrington and Lord Cullen) adhered

H. L. (Sc.) 1921

GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK.

to the interlocutor of the Lord Ordinary dismissing the action.

The appeal to this House was originally argued on December 6 and 8, 1920, upon the construction of s. 109 of the Special Act and judgment was reserved. While the case was under consideration Lord Atkinson called the attention of their Lordships to s. 23 of the Harbour, Docks and Piers Clauses Act, 1847, as having an important bearing on the question at issue, and accordingly the appeal was set down for re-argument solely as to the effect of this section.

1921. Feb. 23. *Condie Sandeman K.C.* (with him *Thos. A. Gentles*) (both of the Scottish Bar) for the appellants. Sect. 23 of the Act of 1847 deals with warehouses and sheds and the appellants felt some doubt whether in those circumstances the general words " other conveniences " could be so construed as to include graving docks. But assuming that the section applies this lease is obviously bad.

Sir John Simon K.C. and *H. P. Macmillan K.C.* (with *A. Morrice Mackay K.C.*) (the two latter of the Scottish Bar) for the respondents. Sect. 23 of the General Act is much less extensive than s. 109 of the Special Act; it deals with minor accessories only, and the words " other conveniencies " must be read in that connection.

[LORD BIRKENHEAD L.C. said that their Lordships would put into writing their reasons for the conclusion at which they had arrived, and he made some general observations (fully reported in 1921 W. N. 85) as to the duty of counsel to bring to the notice of the House all authorities, so far as they were aware of them, which had any material bearing upon the matters under debate.]

1921. May 2. LORD BIRKENHEAD L.C. (read by VISCOUNT FINLAY). My Lords, this is an appeal from an interlocutor, dated March 31, 1920, of the First Division of the Court of Session adhering to an interlocutor, dated July 27, 1919, of the Lord Ordinary (Lord Hunter). The action out of which the appeal arises was instituted by the

appellants, two limited liability companies, the first incorporated under the Companies (Consolidation) Act, 1908, and having their registered office at No. 6, Grey Place, Greenock; and the second incorporated under the Joint Stock Companies Acts, 1862 to 1890, and having their registered office at Western Square, Greenock, against the Trustees of the Port and Harbours of Greenock, incorporated by the Greenock Port and Harbours Consolidation Act, 1913, and James Lithgow and Henry Lithgow, two shipbuilders, of Port Glasgow, to have it found and declared (*a*) that the defenders the trustees had no power or right to grant an exclusive use to the defenders second called, or to any other person, the exclusive use of that portion of the undertaking of the first defenders known as the Garvel Graving Dock, and (*b*) that a certain very complicated lease executed by the above-mentioned trustees to the said James Lithgow and Henry Lithgow, (1.) of the Garvel Graving Dock with the jetty and dolphins used in connection therewith and the whole appurtenances thereof, and (2.) of certain areas of ground adjoining the said dock therein described, for a term of ten years from August 15, 1918, at the yearly rent of 4500*l.*, should be reduced as having been made ultra vires. The defenders, James Lithgow and Henry Lithgow, did not enter any defence.

The said lease contained a provision (No. 9) that in case the lessees should, with the sanction of the lessors, widen the entrance to the graving dock in a manner approved of by the latter, the lessees should have the option of extending the lease for a further period of ten years, making twenty years in all, paying the same yearly rent of 4500*l.* The appellants are admitted to be payers of rates on goods, and as such have and exercise the right of voting in the election of certain of the Harbour Trustees who fall to be elected by and from shipowners and ratepayers registered as electors under the Act of 1913. The business of the appellants is alleged to be served by, and dependent upon the service of, vessels using the Port and Harbours of Greenock which may from time to time require the use of the Garvel

H. L. (Sc.) 1921 GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK. Lord Birkenhead L.C.

Graving Dock. This last-named dock was made by the trustees in the year 1871 under the powers conferred upon them by the Greenock Port and Harbours Act, 1866, referred to as the Act of 1866: see s. 8. It was paid for by them out of the trust funds in their hands. In the record no mention is made of the fact that, by s. 6 of the Act of 1913, the Harbours, Docks, and Piers Clauses Act, 1847, with the exception of certain sections, is incorporated therewith. In the supplementary statement printed at p. 15 of the case to your Lordships' House one finds the following statement: By s. 6 of that Act (i.e., the Act of 1913) there was incorporated therewith the Harbours and Docks and Piers Act, 1847, with the exception of certain sections which are not relevant or material to this case. If that only means that the excepted sections which are not incorporated are not relevant or material to the case it is, of course, right. These excepted sections are ss. 16 to 19 inclusive, ss. 25 and 26, and ss. 70 to 80 inclusive, but if the statement means that all of the sections of the Act of 1847 which are incorporated are not relevant or material, the statement is utterly inaccurate and misleading, for s. 23 of the Act of 1847, which is incorporated, provides that: "The undertakers may lease or grant the use or occupation of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the special Act, at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the persons taking the same, provided that no such lease be granted for a longer term than three years." By s. 6 of the Act of 1913, it is provided that the word "undertakers" used in the Act of 1847 shall mean the trustees under the Act of 1913, and the words "special Act" shall mean the Act of 1913. It will be observed that this s. 23 deals with the leasing not only of things and conveniences which may be provided for the purposes of the Act of 1847, but also with the leasing of those conveniences which may be provided for the purposes of the special Act—i.e., the Act of 1913. In that sense the section

is prospective in its operation. Neither the appellants nor the respondents, however, took their stand on this section. On the contrary, they have studiously ignored its existence. In the pleadings in the case it was not definitely referred to, much less relied upon. Neither before the Lord Ordinary nor on the appeal to the First Division, nor yet in the course of the argument before your Lordships, was any allusion direct or indirect made to it. It was only after the arguments in this House had been concluded, and your Lordships had taken the case into consideration, that my noble and learned friend Lord Atkinson called attention to s. 23 and its important provisions as expressly bearing upon the issue whether the lease which is challenged would stand. The attention of parties was called to the topic, and a second hearing confined thereto was given by this House on February 23.

In the first argument both parties, having left s. 23 out of consideration, took their respective stands upon s. 109 of the Act of 1913, which runs as follows: "The trustees may from time to time and at any time appropriate for ships or grant the exclusive right to use any of their quays, wharves, berths, warehouses, sheds, quayage space, timber yards and timber ponds and any of their other works and conveniences to any corporation, company or person on such terms and conditions as the trustees think fit." The respondents contended (1.) that the words "other works and conveniences," occurring in this section, cover the Garvel Graving Dock; and (2.) that the words "appropriate or grant the exclusive right to use" authorize the execution of the complicated lease impeached. On behalf of the appellants it was contended (1.) that these latter words did not authorize the making of this lease, and (2.) that the words "other works and conveniences" should be construed as only designating works and conveniences ejusdem generis with those actually named. In the course of these contentions the more general and important question was discussed to which I shall allude at the conclusion of my speech.

H. L. (Sc.)
1921
GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK.
Lord Birkenhead L.C.

Upon the issues thus raised their Lordships, for the reasons hereafter appearing, do not propose to express any opinion. They feel they must dispose of the appeal on an altogether different ground—namely, the proper construction, in the events which have happened, of s. 23 of the Act of 1847. This section is one of a group of five sections dealing with the construction of warehouses and other conveniences. The first of these—namely, s. 20—provides that the undertakers may acquire by contract of purchase any lands adjoining or near to the undertaking in addition to the lands acquired by them compulsorily under the powers of the special Act for extraordinary purposes which are described thus: (1.) "For making and providing additional yards, wharfs, and places for receiving, depositing, and loading or unloading goods, and for the erection of weighing machines, tollhouses, offices, warehouses, sheds, and other buildings and conveniences," and (2.) "for making convenient roads to the harbour, dock, or pier, or any other purpose which may be requisite or convenient for the formation or use thereof." That, I think, must mean requisites or conveniences for the formation or use of the harbours, docks, or piers. The word "thereof" cannot be confined, I think, to the roads to be made. Sect. 21 empowers the undertakers to construct on the lands which they have acquired by either or both of the methods mentioned, such warehouses, storehouses, sheds, and other buildings and works as they may deem necessary for the accommodation of goods shipped or unshipped within the harbour, dock, or pier, and may erect or provide such cranes, weighing and other machines, conveniences, weights, and measures as they may think necessary for loading, unloading, measuring, and weighing such goods. By s. 22 the undertakers or their lessees are required to provide proper servants and labourers for working such cranes at all reasonable times for the public use thereof. Then comes s. 23. It would appear to be clear that the Legislature meant to provide by this section for the leasing of any of the several works and conveniences mentioned in the two preceding sections.

It would, I think, be quite irrational to hold that a lease of a warehouse for five years was invalid because warehouses were specifically mentioned in s. 23, but that a lease of a tollhouse, for instance, for five years was valid because tollhouses were not specifically mentioned in it. Looking, therefore, at the special provisions of those three sections by themselves, it is obvious that the words "other conveniences" occurring in s. 23 must receive a wide construction, and are not to be confined to works or things ejusdem generis with those specifically mentioned in that section. So much for the Act of 1847.

The 29 & 30 Vict. c. clvi. (Local and Personal), entitled the Greenock Port and Harbours Act, 1866, which authorizes the construction of the graving dock, begins with a lengthy recital containing the following passage amongst others: "Whereas the number and size of ships and other vessels resorting to the said harbours have of late years greatly increased and are still increasing, and the trade and commerce of the port have become more extensive, and it would be of public advantage that a new harbour and a graving dock and other works should be constructed and lands acquired for the accommodation of the said shipping and commerce." It is reasonably clear that the promoters and framers of this statute considered that this graving dock would be a great convenience for the shipping and trade of the harbour, and in the very nature of things it is a convenience for the ships frequenting a harbour that they should find there a graving dock where needed repairs could be executed. The question for decision is, however, whether it was a convenience provided by the undertakers, the respondents, for the purposes of the special Act, that is the Act of 1913, within the meaning of s. 23 of the Act of 1847.

The statute of 1913 begins with a recital that by the aforesaid Act of 1866 divers Acts relating to the Port and Harbours of Greenock were repealed, and, with the exceptions therein mentioned, consolidated with amendments. The Trustees of the Port and Harbours of Greenock were incorporated, and the undertaking as therein set forth of the then existing

H. L. (Sc.) 1921 GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK. Lord Birkenhead L.C.

trustees was transferred to the trustees then incorporated. It is then recited that by a number of Acts named further powers were given to these trustees; that since the year 1888 the constitution of the existing trustees has remained unaltered; that it is expedient that the constitution of the existing trustees should be amended and altered; that the trustees should be re-incorporated as is by the Act of 1913 provided, and that the undertaking of the existing trustees should be transferred to and vested in the trustees so reincorporated, thereinafter called "the trustees." By s. 9 of this Act of 1913 the first of these objects was effected, and the trustees were incorporated under the name by which they are sued in this action. By s. 46 it is enacted that on an after the appointed day—namely, November 18, 1913 (s. 8), the port and harbours and the whole rights of the existing trustees should be and the same were thereby vested in and transferred to the trustees, i.e., the respondents. This was obviously done for the purposes of this Act of 1913. The definition of "port and harbours" is as wide as it well could be. It includes, amongst many other things, docks, locks, works, yards, jetties, wharves, piers, quays, warehouses, sheds, shipways, harbour rails, and premises whatsoever for the time being belonging to the existing trustees. Part V. of the Act is headed "Works." It includes s. 52 and the sixteen following sections. The first of these empowers the trustees to make and maintain the works thereinafter described, or some of them or some part or parts thereof, and the works and conveniences connected therewith, that is to say, the widening on both sides and deepening of the entrance of the graving dock and the lowering of the site of the said graving dock. The following section enables the trustees to make and maintain additional works, including shipways, shipping places, locks, basins, caissons, sluices, etc., and other works, machinery and conveniences, if any. By s. 110 it is enacted that the limits of the port and harbours shall extend to and include the whole works, land, and property vested in and belonging to the existing trustees, and the

trustees under the Harbour Acts and this Act. The graving dock being thus vested in the respondents the statute proceeds to provide how it shall be used. By s. 128 the trustees may levy and take from any vessel entering or using the graving dock the rates and dues mentioned in Sch. G annexed to the Act, just as they may under the succeeding section levy rates and dues for the use of their cranes, or under s. 131 for the use of their sheds. All these obvious conveniences are treated alike. By s. 193 it is provided that as to this graving dock the regulations set forth in Sch. N annexed to the Act are to be enforced in the same manner as if they were bye-laws made under the Act of 1847. These regulations contain precise and elaborate provisions touching the entry of vessels into the graving dock, the mode and manner in which they shall use the dock when admitted, and the nature and extent of the control exercised over them by the harbour-master after they have been admitted. Having regard to these several statutory provisions, I think, owing to the events which have happened, this graving dock must now be taken as having been, at the date of the impeached lease, provided as a convenience for the purposes of the Act of 1913 within the meaning of s. 23 of the Act of 1847, although it was originally constructed under the Act of 1866. The impeached lease is, therefore, owing to the length of its term, ten years, void, and the interlocutors appealed from will be recalled and decree will fall to be pronounced in terms of the reductive conclusion of the summons.

With regard to the first, that is to say, the declaratory conclusion, it has been a point for consideration whether absolvitor should not be pronounced therefrom, in view of the circumstances of the argument already mentioned. In reference to this, it should be stated that, had the provisions of s. 109 of the Act been properly before the House for construction, it would, of course, have been necessary to examine also the further question—namely, how far the provisions of this lease are reconcilable with the statutes and the regulations made under them, dealing with the use

H. L. (Sc.) 1921 — GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK. — Lord Birkenhead L.C.

and government of this graving dock, and whether the apparent monopoly of enjoyment thereof is consistent with the public trust under which the property is held. In the circumstances already stated in which the House confines its pronouncement to the effect of s. 23 of the Act, and the reductive conclusion of the summons, it becomes unnecessary to deal with the declaratory conclusion. The appeal succeeds, not, however, upon the grounds put forward by the appellants, but upon grounds never put forward by the appellants (though they should have been); never alluded to by either of the parties in any Court. It may be that this omission has brought about the entire litigation, certainly I should think it has brought about this appeal. I therefore think that both parties should bear their own costs here and below.

VISCOUNT FINLAY. My Lords, the appellants are traders who use the Port of Greenock. The respondents are the Trustees of the Port and Harbours of Greenock under the Greenock Port and Harbours Consolidation Act of 1913. Their statutory undertaking includes three graving docks, the most important of which is the Garvel Graving Dock, which will accommodate one large vessel, say of 7000 tons, or two smaller vessels. In September, 1918, the trustees made a lease of the Garvel Graving Dock to Messrs. Lithgow, shipbuilders, in Port Glasgow. The lease was for ten years from August 15, 1918, with a provision for a renewal for a further period of ten years. The lease comprised, first, the graving dock, with engines, boilers, and machinery, etc.; secondly, an area of ground of 2000 square yards or thereabout adjoining the graving dock. The second clause of the lease provides that the rent should be 4500*l.* per annum, with a proviso that in the event of the lessors' right to enter into this lease being successfully challenged, and the lessees being deprived of the dock, the rent should be reduced to 250*l.* per annum, to be paid in respect of the said area of ground. By clause 4 the engineer and firemen required for the working of the engines, boilers, and machinery used

in connection with the docks and the hydraulic system at the lessors' docks were to be appointed by the lessors, who were also to supply the coal, etc., required for working the engines, but the engineer and firemen were to be under the control of the lessees for all work required by them in connection with the lease. By the sixth clause the lessees were to allow the lessors such use of the engines, etc., as should be necessary in connection with the hydraulic system at their docks. By clause 8 the lessees were to have power, with the sanction of the lessors, to widen the entrance to the dock, and by the ninth clause, if this widening should be carried out to the satisfaction of the lessors, the lessees were to have the option of extending the lease for another period of ten years.

On February 1, 1919, the appellants began an action in the Court of Session against the trustees of the port and Messrs. Lithgow, in which the pursuers asked (first) for a declaration "That the Trustees of the Port and Harbours of Greenock have no power or right to appropriate or grant to the defenders second called, or any other manufacturer, trader, shipbuilder or other individual member of the public, the exclusive right to use or to control and regulate the use of that portion of the undertaking of the Trustees of the Port and Harbours of Greenock known as the Garvel Graving Dock," and (second) for reduction of the lease. The material pleas in law for the pursuers were: "1. In respect that upon a sound construction of the Greenock Port and Harbours Consolidation Act, 1913, the defenders, the Trustees of the Port and Harbours of Greenock, are vested with and are bound to exercise the control, regulation, and administration of the Garvel Graving Dock as part of their statutory undertaking, and in particular the use of said graving dock by vessels resorting thereto as regards time and order of admission, and that the grant to any private firm or individual of the exclusive use of said graving dock is inconsistent and incompatible with the statutory rights and duties of the trustees on the one hand and the public, and in particular the pursuers, on the other hand, the

H. L. (Sc.) 1921 — GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK. — Viscount Finlay.

pursuers are entitled to decree in terms of the declaratory conclusion of the summons. 2. The lease between the Trustees of the Port and Harbours of Greenock and the defenders second called libelled in the summons being upon a sound construction of the said Greenock Port and Harbours Consolidation Act, 1913, ultra vires of the trustees, the pursuers are entitled to decree of reduction in terms of the recissory conclusion of the summons." The pleas in law for the defenders were, in substance, that the lease was intra vires. Lord Hunter, as Lord Ordinary, dismissed the action, and his decision was upheld in the Inner House (First Division). From that decision this appeal was brought to your Lordships' House, and it has been twice argued. The first argument, which extended over two days—December 6 and 8 last—was devoted to an exhaustive examination of the Greenock Port and Harbours Consolidation Act, especially of s. 109. It was urged for the appellants that the provisions of that Act did not authorize any lease by the trustees of the graving dock, while the respondents argued that the lease was intra vires. At the conclusion of the argument your Lordships took time for consideration.

While the case was under consideration Lord Atkinson called the attention of your Lordships to the existence of s. 23 of the Harbour, Docks, and Piers Clauses Act, 1847, which is incorporated in the Greenock Act. This section is as follows: "XXIII. The undertakers may lease or grant the use or occupation of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the special Act, at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the persons taking the same, provided that no such lease be granted for a longer term than three years." This section was not printed in the appendix, and attention had not been called to it by either side during the argument. Your Lordships directed that the parties should be invited to address to the House any argument that they thought proper as to the effect of this section, and both sides attended on February 23 for the

purpose, the argument on this second hearing being confined to the question of the application and effect of this clause 23. It appears to me to be clear beyond all question that this s. 23 applies to this case and that its effect is decisive. The graving dock falls within its terms, but no lease for a longer time than three years could be granted. The clause puts the right to make a lease of the graving dock beyond question, but it also establishes that this particular lease, which is for ten years, with the provision for possible extension, is invalid. It is invalid altogether; it cannot be remodelled so as to stand good for three years. It therefore appears that the whole of the argument which was addressed to your Lordships on December 6 and 8 last was otiose and could not have taken place if your Lordships had been aware of the existence of this s. 23. I had prepared after the first argument a judgment stating the conclusion at which I had arrived as to the effect of the Greenock Act. I do not propose to read this judgment as the discovery of s. 23 has rendered the question purely academic.

It appears to me that the proper course is to remit to the Court of Session with instructions to find that it is unnecessary to deal with the first conclusion of the summons, and on the second conclusion to direct reduction of the lease as contravening the provisions of s. 23 of the Harbours, Docks, and Piers Clauses Act, 1847.

There should, in my opinion, be no costs either in this House or in the Court of Session.

LORD DUNEDIN. My Lords, I concur in the opinion of my noble and learned friend the Lord Chancellor. The summons as framed asked for a declarator in general terms. I should myself have preferred to deal with that conclusion in order either to give effect to it or grant absolvitor from it. But I do not dissent from what I gather is the opinion of your Lordships that in the circumstances, the lease being bad in respect of the section in the Harbours, Docks, and Piers (Clauses) Act, it is unnecessary to dispose of that conclusion.

H. L. (Sc.)
1921
GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK.
Lord Dunedin.

Now, as the summons is framed, the second reductive conclusion looks as if it were merely ancillary to the first or declaratory conclusion. The pursuers either did or did not know of the section of the Piers and Harbours Act incorporated in the special Act which prohibits leases of more than three years' duration. If they did know of it, they ought to have inserted after the first conclusion the usual words "and whether it be so declared or not," and then proceeded with the reductive conclusion; and they ought to have quoted the section in their condescendence, and framed a separate plea in law referring to it. If they did not, they are really winning this case on a plea discovered for them in this House. This disentitles them to costs.

I am therefore of opinion that the interlocutors, so far as appealed against, should be reversed, and that the case should be remitted to the Court of Session with instructions to pronounce a decree of reduction in terms of the second conclusion of the summons, and to find it unnecessary to dispose of the declaratory conclusion, and to find no expenses due to either party. I think there should be no costs awarded in this appeal.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of seeing beforehand the judgment of the Lord Chancellor which has just been read. I so fully concur with it that I have nothing to add.

VISCOUNT FINLAY. My Lords, I am authorized to say that my noble and learned friend Lord Shaw concurs in the judgment I have delivered.

Interlocutors of the Lord Ordinary and First Division of the Court of Session in Scotland, so far as complained of, reversed; and Cause remitted to the Court of Session in Scotland, with instructions to pronounce a decree of reduction in terms of the second

conclusion of the summons, to find it unnecessary to dispose of the first declaratory conclusion, and to find no expenses due to either party, and to do therein as shall be just and consistent with this judgment: Each party to bear their own costs in respect of the appeal to this House.

Lords' Journals, May 2, 1921.

H. L. (Sc.) 1921 GLEBE SUGAR REFINING CO. v. TRUSTEES OF PORT AND HARBOURS OF GREENOCK.

Agents for the appellants: *Ward, Bowie & Co., for Patten & Prentice, Greenock, and Hugh Patten, W.S., Edinburgh.*

Agents for the respondents: *Beveridge & Co., for Neill, Clerk & Murray, Writers, Greenock, and Wm. B. Rainnie, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

GITTUS . . . . . APPELLANT;

AND

COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

H. L. (E.)* 1921 *April* 18.

Revenue—Excess Profits Duty—Computation of Profits—Set-off—Loss in Business during accounting Period—Change of Ownership in Business during that Period—Extent of Set-off—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38, *sub-s.* 3; *s.* 40, *sub-s.* 1; *Sch.* 4, *Part II., r.* 5.

In an accounting period and at a time coming respectively within the Finance (No. 2) Act, 1915, Part III., s. 38, sub-s. 3, and Sch. 4, Part II., r. 5, a loss had been sustained in a business, and there had also been a change of ownership of the business, the appellant having succeeded to it. An application was made under Sch. 4, Part II., r. 5, that Part III. of the Act should apply as if the business had not changed ownership. As against the excess profits duty payable by the appellant in respect of the succeeding accounting period it was admitted that he was entitled under s. 38, sub-s. 3, to set off the proportion of the loss applicable to that part of the accounting period in which the loss

---

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD ATKINSON, and LORD SUMNER.

H. L. (E.)
1921
GITTUS
v.
INLAND REVENUE COMMISSIONERS.

occurred during which he was himself the owner of the business, but he claimed to be entitled to set off also the proportion of the loss applicable to the part of the period during which his predecessor was the owner:—

Held, (1.) that s. 38, sub-s. 3, taken alone, only entitled a person to set off a loss which was personal to himself; (2.) that the application under Sch. 4, Part II., r. 5, did not cause the whole of the provisions of Part III. of the Act relating to excess profits duty to have effect as if there had been no change of ownership, but that the whole rule was limited to the question how pre-war profits were to be ascertained for the purposes of the Act; (3.) that s. 40, sub-s. 1, did not incorporate r. 4 of the rules applicable to the first and second cases of Sch. D contained in s. 100 of the Income Tax Act, 1842, which provides that if a business changes hands before or during the period of assessment the income tax is nevertheless to be computed according to the average profits of the three preceding years, because that rule was excluded by r. 1 of the Fourth Schedule, Part I., of the Act of 1915, which expressly provides that the profits shall be taken to be the actual profits arising in the accounting period.

Held, therefore, that the appellant was not entitled to set off the proportion of the loss applicable to the time of his predecessor's ownership of the business.

Decision of the Court of Appeal [1920] 1 K. B. 563 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Staincross in Yorkshire.

The appellant's father carried on the business of a wagon builder for many years down to his death on September 6, 1915, when the business passed under his will to the appellant.

The question to be decided was whether in arriving at the amount payable by the appellant for excess profits duty in respect of the trade year ending September 30, 1916, he was entitled to set off against his excess profits for that year a deficiency of profits sustained by his predecessor in business in the preceding trade year.

The Commissioners decided this question in favour of the appellant, but their decision was reversed by Rowlatt J., and his decision was affirmed by the Court of Appeal (Lord Sterndale M.R., Atkin and Younger L.JJ.).

(1) [1920] 1 K. B. 563. (2) [1919] 2 K. B. 766.

The facts are fully stated in the report of the case before Rowlatt J., and sufficiently appear from the judgment of Viscount Cave.

March 15, 17, 1921. *Sir John Simon K.C.* and *A. M. Latter* (*Maugham K.C.* with them) for the appellant. The appellant claims to be entitled to set off against the excess of profit of the business for the accounting period October 1, 1915, to September 30, 1916, the deficiency or loss sustained by the same business in the accounting period, October 1, 1914, to September 30, 1915.

(1.) Sect. 38, sub-s. 3, of the Finance (No. 2) Act, 1915, which provides for this set-off, does not call for an identity of persons throughout. The sub-section should be construed as referring to a person or his predecessor; it does not cease to operate merely because there has been a succession.

(2.) By virtue of s. 40, sub-s. 1, the profits to which Part III. of the Act applies—i.e., the Part dealing with Excess Profits Duty—are to be determined on the same principle as the profits and gains of the business would be determined for the purpose of income tax. One of those principles is to be found in the 4th rule of the Rules applicable to the First and Second Cases, Sch. D. That rule shows that the profits and gains are to be arrived at by disregarding the succession. It is true that the three years' average is specifically excluded by r. 1 of Part I. of the Fourth Schedule to the Act of 1915, but the 4th rule above referred to is not dealing with that, but says that for the purpose of computing profits or gains the business, notwithstanding any change of ownership, is to be treated as continuous. Applying that principle to the concluding words of sub-s. 3 of s. 38 of the Act of 1915 the appellant is entitled to set off against any excess profits duty payable by him in respect of any succeeding accounting period such an amount as will make the total amount of excess profits duty paid during the whole period accord with the profits or losses during that period.

(3.) By virtue of the exception in r. 5 of Part II. of the Fourth Schedule to the Act of 1915 the provisions of Part III.—

H. L. (E.) 1921 — CITTUS v. INLAND REVENUE COMMISSIONERS.

i.e., the provisions relating to excess profits duty—as well as the Schedule are to apply as if the business had not changed ownership. In the case stated by the Commissioners it was admitted that this case should be decided on this footing—i.e., that the appellant should be treated as having made an application under r. 5 that the provisions of Part III. of the Act and the Schedule should apply as if the trade or business had not changed ownership. It has been held in the Courts below that the operation of the rule is limited to the pre-war standard of profits, but that does not do justice to the wide effect of the exception, and on that hypothesis r. 6 of the same Schedule becomes unintelligible.

[They referred to *Scottish Shire Line* v. *Lethem* (1); *Wankie Colliery Co.* v. *Inland Revenue Commissioners* (2); *Fletcher* v. *Birkenhead Corporation.* (3)]

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *Reginald Hills* for the respondents were not called upon.

The House took time for consideration.

1921. April 18. VISCOUNT FINLAY. My Lords, in this case I have had the opportunity of reading the judgment which my noble and learned friend Lord Cave proposes to deliver. I agree with that judgment, and I have nothing to add. I am authorized to state that my noble and learned friend Lord Haldane also agrees with that judgment.

VISCOUNT CAVE. My Lords, the question raised by this appeal is whether, in arriving at the amount payable by the appellant for excess profits duty in respect of the trade year ending September 30, 1916, he is entitled, under s. 38, sub-s. 3, of the Finance (No. 2) Act, 1915, to set off against his excess profits for that year a deficiency of profits sustained by his predecessor in business in the preceding trade year.

Sect. 38, sub-s. 3, of the Act of 1915 is in the following terms: "Where a person proves that in any accounting period,

(1) 1912 S. C. 1108; 6 Tax Cas. 91.

(2) [1920] 3 K. B. 287.

(3) [1907] 1 K. B. 205.

which ended after the fourth day of August nineteen hundred and fourteen, his profits have not reached the point which involves liability to excess profits duty, or that he has sustained a loss in his trade or business, he shall be entitled to repayment of such amount paid by him as excess profits duty in respect of any previous accounting period, or to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period."

The facts giving rise to the appeal are as follows: The appellant's father, Mark William Gittus, carried on the business of a wagonbuilder at Penistone for many years before and down to his death on September 6, 1915; and on his death the business passed under his will to his son, the appellant, William B. Gittus, who continued it without break or interruption under the name of "William Gittus and Son." The accounts of the business were made up yearly to September 30; and accordingly under the provisions of s. 38, sub-s. 2, of the above-mentioned Act each trade year ending September 30, commencing with that which ended on September 30, 1914, became an accounting period for purposes of excess profits duty.

In the trade year ending September 30, 1914, during which the business was carried on by the appellant's father, the business produced a profit in excess of the pre-war standard of profits as ascertained for the purposes of the Act together with the statutory allowance of 200*l.*; and accordingly the estate of Mark William Gittus became, on the passing of the Act, chargeable with excess profits duty in respect of such excess. In the following trade year ending September 30, 1915, during a part of which (being the period from October 1, 1914, to September 6, 1915) the business was carried on by the appellant's father, and during the remainder of which (being the period from September 7 to 30, 1915) it was conducted by the appellant, the business resulted in a loss, thereby occasioning a considerable deficiency of profit as compared

H. L. (E.) 1921 GITTUS v. INLAND REVENUE COMMISSIONERS. Viscount Cave.

with the pre-war standard and statutory allowance; and the share of such deficiency attributable to the portion of the trade year which elapsed before the death of the appellant's father was more than sufficient under the provisions of s. 38, sub-s. 3, of the Act to extinguish the liability of his estate for excess profits duty. In the third trade year, ending September 30, 1916, during which the appellant was alone entitled to the business, there was once more an excess of profit over the pre-war standard and statutory allowance; and it is in respect of the liability of the appellant for duty on this excess that the present dispute arises.

The Commissioners of Inland Revenue, in assessing the appellant to excess profits duty in respect of the year 1915–16, allowed him a set-off in respect of so much only of the deficiency of the preceding year as was attributable to the period during which he was himself carrying on the business, that is to say, to the period from September 7 to 30, 1915. The appellant appealed against this assessment to the General Commissioners, and contended that he was entitled under the above sub-section to use the whole of the deficiency for the year 1914–15 (so far as not absorbed in extinguishing the liability of his father's estate to excess profits duty in respect of the previous year) for obtaining relief against the duty chargeable upon him for the year 1915–16, in which case his liability for duty would disappear. This contention found favour with the General Commissioners, who discharged the assessment; but on an appeal by the Commissioners of Inland Revenue to the King's Bench Division the decision of the General Commissioners was reversed by Rowlatt J., who restored the assessment. An appeal to the Court of Appeal was unsuccessful, and thereupon the present appeal was brought.

Three points were raised in argument on behalf of the appellant.

First, it was said that in the case of a continuing business, such as the present, excess profits duty is levied on the excess profits from time to time derived from that business without regard to changes of ownership; and accordingly that in

applying s. 38, sub-s. 3, the business should be treated as a continuous whole and the owner for the time being of the business should be held entitled to relief as though he had carried on the business throughout.

My Lords, I do not doubt that, for the purposes of the comparison of profits to be made under s. 38, sub-s. 1, of the Act, a continuing business is treated (except as otherwise provided in the rule to be hereafter mentioned) as one concern; and it might not have been unreasonable that the relief provided by s. 38, sub-s. 3, should be given to the business as a whole notwithstanding changes of ownership. But I do not think it possible so to construe the sub-section. While in the earlier sub-sections of s. 38 and elsewhere in the Act reference is made to the trade or business itself as a profit producing concern, when we come to sub-s. 3 there is a significant change of language. The relief there provided is given to a "person," and that person must prove a deficiency in "his profits" in order to be entitled to a return or set-off in respect of duty paid or payable "by him." The object of the sub-section is expressed to be to make the total amount of duty "paid by him" during the whole period accord with "his profits or losses" during that period. In my opinion it would be doing violence to the express terms of the Act to construe these expressions as including a previous owner of the business. There is in this statute just that "personal note" which in the case cited to your Lordships: *Scottish Shire Line* v. *Lethem* (1), was found by the Court of Session to be absent from the statute there in question. This being so, I agree with the opinion expressed by Rowlatt J. and adopted by the Court of Appeal that, taking this section alone, it clearly points to the case of an individual, and means that the loss in his business which a person is to be entitled to set off against the excess profits duty payable by him is a loss personal to himself.

But, secondly, the appellant relies on r. 5 of Part II. of the Fourth Schedule to the Act, which is as follows: "Where since the commencement of the three last pre-war trade years

(1) 6 Tax Cas. 91.

H. L. (E.) 1921 GITTUS v. INLAND REVENUE COMMISSIONERS. Viscount Cave.

a trade or business has changed ownership, the provisions of this Part of this Schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this Schedule should apply as if the trade or business had not changed ownership, but in that case such modifications (if any) shall be made in the application of this Schedule as may be necessary to make the basis on which the profits standard is computed the same as that on which the profits of the accounting period are computed."

It appears to have been agreed between the parties that for the purposes of this case it should be taken that the appellant had made the application referred to in the above rule; and it was argued that, this being so, all the provisions of Part III. of the Act, including s. 38, sub-s. 3, applied as if the business had not changed ownership and accordingly that the appellant was entitled to the relief claimed. In my opinion, this is not the meaning or effect of the rule, which has reference only to the ascertainment of the pre-war standard of profits. Part II. of the Schedule (of which the rule forms part) is incorporated in the Act by s. 40, sub-s. 2, which enacts that "the provisions contained in the second part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year"; and Part II. itself is headed "Pre-war Standard." These circumstances by themselves might not be sufficient to limit the operation of the rule if it clearly dealt with other matters not covered by the reference or the heading. But the operative words of r. 5 are equally restricted in their scope; for they declare only that in the event therein mentioned "the provisions of this Part of the Schedule," that is to say, the part dealing with the pre-war standard, "shall apply as if a new trade or business had been commenced on the change of ownership." It is true that an exception is made in cases where the taxpayer "makes an application that the provisions of Part III. of this Act and this Schedule should apply as if the trade or business had not changed ownership"; and

it is on the wide terms in which this application is described that the argument for the appellant is founded. But the only effect of the exception is that, when it becomes operative, the preceding and dominant part of the rule falls to the ground and "this Part of the Schedule"—namely, the part relating to the pre-war standard—applies as if no new business had been commenced. In order to sustain the appellant's argument it would be necessary to read into the rule a declaration that in cases where the application referred to is made the whole of the provisions relating to excess profits duty shall have effect as if there had been no change of ownership; and I do not think that in construing the rule so large an addition to its provisions is permissible. It is noticeable that the concluding portion of the rule, that which deals with the consequences of the exception, is concerned only with the pre-war profits standard. For these reasons I am of opinion that the whole rule is limited to the question how pre-war profits are to be ascertained for the purposes of the Act.

It is suggested that r. 6 of the same part of the schedule refers to something other than the pre-war standard; but even if that be so, it cannot (I think) affect the meaning and scope of the 5th rule. In my opinion this argument also fails.

The third point taken by counsel for the appellant was founded on s. 40, sub-s. 1, of the Act, which provides that the profits arising from a trade or business to which the Act applies are to be determined "on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the first part of the Fourth Schedule to this Act and to any other provisions of this Act." It is said that this provision incorporates the fourth of the rules applicable to the first and second cases of Sch. D, contained in s. 100 of the Income Tax Act, 1842, which provides that if a business changes hands before or during the period for assessment, the income tax is nevertheless to be computed according to

H. L. (E.) 1921 — GITTUS v. INLAND REVENUE COMMISSIONERS. — Viscount Cave.

the average profits during the three preceding years. But this rule is excluded by r. 1 of Part I. of the Fourth Schedule to the Act of 1915, which expressly provides that for the purposes of the Act, the profits shall be taken to be the actual profits arising in the accounting period, and the principle of computing profits by reference to any other year or an average of years shall not be followed. In my opinion, therefore, this argument has no force.

Upon the whole case, I agree with the decision of Rowlatt J. and the Court of Appeal, and I am of opinion that this appeal fails and should be dismissed with costs.

LORD ATKINSON. My Lords, I, too, have had the pleasure and advantage of reading the judgment which has just been delivered. I concur in it and have nothing to add.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 18, 1921.

Solicitor for the appellant: *Norman Hart, for Carrington & Leonard, Barnsley.*

Solicitor for the respondents: *H. Bertram Cox, Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

GREAT WEST SADDLERY COMPANY, LIMITED . . . . . } APPELLANTS; J. C.* 1921 Feb. 25.

AND

THE KING . . . . . RESPONDENT.

ATTORNEY-GENERAL FOR CANADA . INTERVENER.

[AND CONSOLIDATED APPEALS.]

ON APPEAL FROM THE SUPREME COURT OF CANADA,

AND

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada—Legislative Powers—Dominion Companies—Provincial Legislative Restrictions—Licence to carry on Business in Province—Holding of Land—Companies Act (R. S. Can., 1906, c. 79), ss. 5, 29—Extra-Provincial Corporations Act (R. S. Ont., 1914, c. 179)—Companies Act (R. S. Man., 1913, c. 35), Pt. IV.—Companies Act (Stat. Sask., 1915, c. 14)—Mortmain and Charitable Uses Act (R. S. Ont., 1914, c. 103)—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

A company incorporated by the Dominion under the Companies Act of Canada (R. S. Can., 1906, c. 79), with power to trade in any Province may, consistently with ss. 91 and 92 of the British North America Act, 1867, be subject to Provincial laws of general application, such as laws imposing taxes, or relating to mortmain or requiring licences for certain purposes, or as to the form of contracts; but a Provincial Legislature cannot validly enact for the enforcements of such laws sanctions which if applied would sterilize or destroy the capacities and powers which the Dominion has validly conferred.

Accordingly, the Extra-Provincial Corporations Act (R. S. Ont., 1914, c. 179), the Companies Act (R. S. Man., 1913, c. 35), and the Companies Act (Stat. Sask., 1915, c. 14), so far as they purport to preclude Dominion trading companies from carrying on their business in the Province unless registered or licensed thereunder, or subject such companies to penalties for so carrying on business, are ultra vires.

Sect. 29 of the Companies Act of Canada (R. S. Can., 1906, c. 79), which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, does not prevail against a severable provision of a Provincial Legislature restricting the power of corporations generally to acquire and hold land in the Province. Accordingly, the Mortmain and Charitable Uses Act (R. S. Ont., 1914,

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD SUMNER, and LORD PARMOOR.

J. C.

1921

GREAT WEST SADDLERY CO. v. THE KING.

c. 103) is valid; but the provisions of R. S. Man., 1913, c. 35, and R. S. Sask., 1915, c. 14, as to the holding of land by Dominion companies, are invalid, since the provisions are not severable from the invalid provisions referred to above.

John Deere Plow Co. v. *Wharton* [1915] A. C. 330 discussed and applied.

Judgments of the Supreme Court of Canada and of the Supreme Court of Ontario (Appellate Division) reversed.

CONSOLIDATED APPEALS by special leave from two judgments of the Supreme Court of Canada (May 6, 1919) and a judgment of the Appellate Division of the Supreme Court of Ontario (December 26, 1917).

The consolidated appeals related to the validity of certain Provincial enactments so far as they purported to apply to companies incorporated under the Companies Act of Canada (R. S. Can., 1906, c. 79). The provincial Acts in question were the Extra-Provincial Corporations Act (R. S. Ont., 1914, c. 179), the Companies Act (R. S. Man., 1913, c. 35), Pt. IV., the Companies Act (Stat. Sask., 1915, c. 14), and the Mortmain and Charitable Uses Act (R. S. Ont., 1914, c. 103). Each of the first three named Acts purported in effect to preclude Dominion companies from carrying on business in the Province unless registered or licensed thereunder, and to impose penalties upon companies so doing. The last-named Act prohibited all corporations from holding real estate in Ontario unless authorized by licence or statute. The Manitoba and Saskatchewan Acts above referred to, requiring Dominion companies to be licensed thereunder, purported to make the obtaining of the licence a condition also for the holding of real estate in the Province. The sections of the Acts in question and their provisions appear more particularly from the judgment of their Lordships, as also does the manner in which their validity came in question in the six cases giving rise to the present appeals.

The Supreme Court of Canada, affirming the judgment of the Supreme Court of Saskatchewan en banc (which by an equal division of opinion affirmed the judgment of the Chief Justice), and affirming by a majority a majority judgment of the Court of Appeal of Manitoba, held that the provisions above referred to of the Acts of Saskatchewan and

Manitoba were intra vires. The appeals to the Supreme Court of Canada are reported at 59 Can. S. C. R., pp. 19 and 35.

In the cases relating to the Ontario legislation there was no appeal to the Supreme Court of Canada. The Appellate Division of the Supreme Court of Ontario held that the provisions in question were intra vires save so far as they precluded an unregistered Dominion company from suing in the Province; that decision reversed the judgment of Masten J. with regard to the provisions of the Extra-Provincial Corporations Act requiring a Dominion company to be licensed before carrying on its business in the Province, and affirmed his judgment with regard to the provisions of the Mortmain and Charitable Uses Act as to the holding of real estate in the Province. The appeal to the Appellate Division is reported at 41 Ont. L. R. 475.

The effect of the judgments of the various learned judges in Canada before whom the cases were argued is more fully stated in the judgment of the Judicial Committee.

1920. Nov. 30; Dec. 2, 3, 6, 7. *F. W. Wegenast* and *T. Moss* for the appellants; *Sir John Simon K.C.* and *Cyril Asquith* for the Attorney-General for Canada, intervener. Each of the appellant companies was incorporated under s. 5 of the Companies Act of Canada (R. S. Can., 1906, c. 79) for trading purposes as shown by their letters patent. Under ss. 5 and 29 of that Act and s. 30 of the Interpretation Act (R. S. Can., 1906, c. 1) they had the fullest corporate powers, including power to hold land for the purpose of their undertakings. The provincial legislation now in question is invalid, since, as held in *John Deere Plow Co.* v. *Wharton* (1), the status and powers of a Dominion company as such cannot be destroyed by Provincial legislation; the provisions of the Provincial Acts are not distinguishable from those of the Act of British Columbia held invalid in that appeal. The legislation cannot be justified under s. 92, head 2, of the British North America Act, 1867, as direct taxation for Provincial

(1) [1915] A. C. 330, 341.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

purposes. The decision in *Bank of Toronto* v. *Lambe* (1) does not apply. Neither its "pith and substance" (see *Union Colliery Co.* v. *Bryden* (2)), nor its "true nature and character" (see *Russell* v. *The Queen* (3)) was Provincial taxation. Its "pith and substance" was that it controlled the exercise of trading and commercial rights which the Dominion had conferred upon Dominion companies. The Acts were, as their titles describe them, Companies Acts. It is a well-established principle that where Dominion legislation rests on one of the heads enumerated in s. 91 it overbears Provincial legislation in the same field, although it is of the kind mentioned in a head of s. 92. The legislative power of the Provinces in the matter was limited to passing Acts which were genuinely regulative in character, and which applied equally to all persons, individual or corporate: *A.-G. for Ontario* v. *A.-G. for Canada* (4); *Toronto (City of)* v. *Virgo* (5); *John Deere Plow Co.* v. *Wharton* (6); *A.-G. for Canada* v. *A.-G. for Alberta.* (7) The Dominion by incorporating a company not only creates a juridical person, it also confers rights and powers. Provincial legislation cannot validly require registration or the taking out of a licence as a condition to those rights and powers being operative.

Nesbit K.C. and *G. Lawrence* for the respondent and intervener the Attorney-General for Ontario and Attorney-General for Manitoba. The Provincial legislation in question was intra vires. The effect of the incorporation was to give the appellants the right to trade in every Province, but subject to valid Provincial legislation. The Dominion had no power, and has not purported, to give the appellant companies the right to trade in violation of valid Provincial legislation. Licensing for the purpose of registration or taxation is intra vires of a Province; the Dominion could not empower its creature to trade unlicensed, and the Provincial legislation

(1) (1887) 12 App. Cas. 575.
(2) [1899] A. C. 580, 587.
(3) (1882) 7 App. Cas. 829, 839, 840.
(4) [1896] A. C. 348, 363.
(5) [1896] A. C. 88.
(6) [1915] A. C. 330.
(7) [1916] 1 A. C. 588, 597.

is therefore not a violation of any Dominion power. The legislation now in question can be described as either (*a*) licensing for the purpose of registration and information, or (*b*) for taxation and statistical purposes. The legislation condemned in *John Deere Plow Co.* v. *Wharton* (1) is distinguishable; the defect there was that the Registrar had a discretion to grant or withhold a licence, and had refused a licence unless the name of the company were altered. The licence here required was not discretionary, but was in the nature of a receipt indicating that the company had complied with all legislative requirements. The requirement of a licence was valid under s. 92, head 9, and the penalties were validly imposed as a method of enforcing that requirement. The legislation is valid under the principles laid down in *Citizens Insurance Co.* v. *Parsons* (2); *Colonial Building Association* v. *A.-G. for Quebec* (3); *Bank of Toronto* v. *Lambe* (4); *Brewers and Maltsters Case* (5); *Canadian Pacific Ry. Co.* v. *Notre Dame de Bonsecours* (6); *A.-G. for Ontario* v. *A.-G. for Canada* (7); *A.-G. of Manitoba* v. *Manitoba Licence Holders' Association.* (8) It was held in *John Deere Plow Co.'s Case* (9) that a Provincial Legislature could regulate the conditions upon which the status and powers conferred by the Dominion by incorporation could be exercised in the Province and could require registration. The powers of the Dominion under the head "trade and commerce" should not be extended; the authorities show that the powers under that head are limited, and that the doctrine as to the "pith and substance" of the legislation is one which cannot safely be applied: *A.-G. for Canada* v. *A.-G. for Alberta* (10); *Cunningham* v. *Tomey Homma.* (11)

Henn-Collins, for the respondent the Attorney-General for Saskatchewan, adopted the above arguments and further distinguished the provisions of the Saskatchewan Act from

(1) [1915] A. C. 330.
(2) (1881) 7 App. Cas. 96, 104, 106, 117.
(3) (1883) 9 App. Cas. 157, 166.
(4) 12 App. Cas. 575, 585, 586.
(5) [1897] A. C. 231.
(6) [1899] A. C. 367, 372.
(7) [1896] A. C. 348, 360.
(8) [1902] A. C. 73, 79.
(9) [1915] A. C. 330, 341.
(10) [1916] 1 A. C. 588, 595, 596.
(11) [1903] A. C. 151.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

those of the other Acts in question. The Act should be construed so as to be valid.

C. Bovill Clark for the respondent shareholders.

Wegenast replied.

1921. Feb. 25. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case their Lordships are called on to interpret and apply the implications of a judgment, delivered by the Judicial Committee on November 2, 1914, in *John Deere Plow Co.* v. *Wharton.* (1) It was then laid down that the British North America Act of 1867 had so enabled the Parliament of the Dominion to prescribe the extent of the powers of companies incorporated under Dominion law with objects which extended to the Dominion generally, that the status and powers so far as there in question of one of the three appellant companies could not as matter of principle be validly interfered with by the Provincial Legislature of British Columbia. It was held that laws which had been passed by the Legislature of that Province, and which sought to compel a Dominion company to obtain a certain kind of Provincial licence or to be registered in the way brought before the Judicial Committee, as a condition of exercising its powers in the Province or of suing in its Courts, were ultra vires. The reason given was that their Lordships interpreted what had been done by the Province in that case as interfering in a manner not consistent with the principles laid down with the status and corporate capacity of a company with Dominion objects to which the Parliament of Canada had given powers to carry on its business in every part of the Dominion.

In the consolidated appeals now before their Lordships analogous questions are raised by legislation in varying forms enacted in three other Provinces, Saskatchewan, Manitoba, and Ontario.

Since the decision in 1914 the Province of Saskatchewan has passed an Act, in 1915, which supersedes its earlier

(1) [1915] A. C. 330.

Companies Acts, and apparently seeks to avoid the features in these which might conflict with the decision of this Committee in *John Deere Plow Co.* v. *Wharton* (1) as to the British Columbia legislation. The question raised as regards Manitoba arises out of older legislation of 1913 (subsequently amended and re-enacted in 1916), and as regards Ontario under an older Ontario Companies Act and the Extra-Provincial Corporations Act of 1914. No question is raised from British Columbia, or from any Provinces other than Saskatchewan, Manitoba and Ontario, on this occasion.

The proceedings out of which the present appeals arise concern several Dominion companies, and are, as to Saskatchewan, two cases before a magistrate for infraction of the provisions of the Provincial Companies Act, and an action by a shareholder in one of the Dominion companies concerned, to restrain it from attempting to carry on its business without complying with the requirements of the Companies Act of the Province. The main issue in all these proceedings is substantially the same. In Manitoba an analogous question was raised in a shareholder's action, and also in an action by the Attorney-General of the Province. The main issue in Ontario was similar to that in Saskatchewan, but there was also raised a question as to whether a Dominion company could hold land in the Province without being authorized to do so by its Government, in accordance with Ontario statute law. In the proceedings referred to judgments were delivered in the Courts of first instance and by the appellate Courts in Saskatchewan and Manitoba, and by the Courts of first instance and the appellate Court in Ontario. In the cases in the two former Provinces there was an appeal to the Supreme Court of Canada, but in the Ontario litigation the appeal has been brought directly to the King in Council from the judgment of the appellate Court of the Province. On August 18, 1919, special leave to appeal to the Privy Council was granted, and it was ordered that the appeals, six in number, from judgments which had been adverse to the Dominion companies concerned,

(1) [1915] A. C. 330.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

should be consolidated and heard together. The Attorneys-General for Canada and for the Provinces have intervened throughout.

It will be convenient, having regard to the course taken in the argument, to consider in the first place the appeal from the Court of Appeal in Ontario.

In order to ascertain the real points now in controversy, it is important to refer in some detail to what was actually decided in 1914 in *John Deere Plow Co.* v. *Wharton.* (1) The British Columbia Companies Act had provided that, in the case of an incorporated company which was not one incorporated under the laws of the Province, and was called in the Act an extra-provincial company, certain conditions must be complied with. If such a company had gain for its object it must be licensed or registered under the law of the Province, and no agent was to carry on its business until this had been done. If this condition were complied with, such an extra-Provincial company might sue in the Courts of the Province and hold land there. Such a company might also, if it were one duly incorporated under the laws of, among other authorities, the Dominion, and if authorized by its charter to carry out purposes to which the legislative authority of the Province extended, obtain from the Registrar, under the general Companies Act of the Province, a licence to carry on business within the Province on complying with the provisions of the Act and paying a proper licence fee. It was then to have the same powers and privileges in the Province as though incorporated under the Provincial Act. If such a company carried on business without a licence it was made liable to penalties, and its agents were similarly made liable. So long as unlicensed, the company could not sue in the Courts of the Province in respect of contracts in connection with its business made within the Province. The Registrar might refuse a licence where the name of the company was identical with or resembled that by which a company, society or firm in existence was carrying on business or had been incorporated, licensed or registered, or where the Registrar

(1) [1915] A. C. 330.

was of opinion that the name was calculated to deceive, or disapproved of it for any other reason.

Their Lordships pointed out that, under the Dominion Companies Act, which they held to have been validly passed, the charter of the John Deere Plow Company incorporated it with the powers to which the legislative authority of the Parliament of Canada extended. The Dominion Interpretation Act provided that the meaning of such an incorporation included this, that the corporate body created should have power to sue, to contract in its corporate name, and to acquire and hold personal property for its purposes. There was in the Dominion Companies Act a provision that such a company should not be incorporated with a name likely to be confounded with the name of any other known company, incorporated or unincorporated, and it gave the Secretary of State the discretion in this connection. On incorporation the company was to be vested with all the powers, privileges, and immunities, requisite or incidental to the carrying on of its undertaking. It was to have an office in the city or town in which its chief place of business in Canada was situated, which should be its legal domicil in Canada, and could establish other offices and agencies elsewhere. No person acting as its agent was to be subjected, if acting within his authority, to individual penalty.

Their Lordships made reference to the circumstance that the concluding words of s. 91 of the British North America Act, " Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," render it necessary to do more than ascertain whether the subject-matter in question apparently falls within any of the heads of s. 92; for if it also falls within any of the enumerated heads of s. 91, then it cannot be treated as covered by any of those in s. 92. As is now well settled the words quoted apply, not only to the merely local or private matters in the Province referred to in head 16 of s. 92, but to the whole of the

J. C
1921
GREAT WEST SADDLERY CO. v. THE KING.

sixteen heads in that section : *A.-G. for Ontario* v. *A.-G. for Canada.* (1) The effect, as was pointed out in the decision just cited, is to effect a derogation from what might otherwise have been literally the authority of the Provincial Legislatures, to the extent of enabling the Parliament of Canada to deal with matters local and private where, though only where, such legislation is necessarily incidental to the exercise of the enumerated powers conferred on it by s. 91.

If therefore in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the Provinces, they cannot be interfered with by any Provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion Government with powers to trade in any Province it may not the less, consistently with the general scheme, be subject to Provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licences for certain purposes, or as to the forms of contracts ; but they were careful not to say that the sanctions by which such Provincial laws might be enforced could validly be so directed by the Provincial Legislatures as indirectly to sterilize or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred. To have said so would have been to misread the scheme of the British North America Act, which is one that establishes interlacing and independent legislative authorities. Within the spheres allotted to them by the Act the Dominion and the Provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly.

(1) [1896] A. C. 348.

This is a principle which has to be kept closely in view in testing the validity of the Provincial legislation under consideration as affecting Dominion companies.

Their Lordships will not repeat what was laid down in the judgment delivered in the *John Deere Plow Case* (1) as to the other aspects of the general question there under consideration, but will proceed, in the light of what has just been said, to the consideration of the validity of the Ontario legislation under review.

The general Companies Act of Ontario was passed before the decision on the *John Deere Plow Case* (1), and has no special bearing on the question in this appeal. The important statute is the Extra-Provincial Corporations Act, which was also passed before that decision. The purpose of the latter statute is to provide that certain classes of extra-Provincial corporations (which mean corporations created otherwise than by or under the authority of an Act of the Ontario Legislature), including those created under any Act of the Dominion and authorized to carry on business in Ontario, must take out a licence (s. 4) under the Ontario statute. On complying with its provisions a corporation coming within these classes is entitled to receive a licence (s. 5) to carry on its business and exercise its powers within Ontario. In the absence of such a licence it is forbidden to do so (s. 7), and its agents are subjected to a like prohibition. A penalty of $20 a day is imposed for any contravention of this provision. An extra-Provincial corporation coming within the classes referred to may apply to the Lieutenant-Governor in Council for a licence to carry on its business and exercise its powers in Ontario, and no limitations or conditions are to be included in any such licence which would interfere with the rights of such a corporation—for example, a Dominion company—to carry on in Ontario all such part of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise there (s. 9, sub-ss. 1 and 2). A corporation receiving a licence may, subject to the limitations and conditions of the licence, and the provisions of its own constitution, hold and

(1) [1915] A. C. 330.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

dispose of real estate in Ontario, just as an Ontario company might (s. 12). A corporation receiving a licence may be called on to make returns comprising such information as is required from an Ontario company (s. 14). The Lieutenant-Governor in Council may make regulations for, among other things, the appointment and continuance by the extra-Provincial company of a representative in Ontario on whom service of process and notices may be made (s. 10, sub-s. 1 (*b*)). If such a company, having received a licence, makes default in complying with the limitations and conditions of the licence or of the provision as to returns, or of the regulations respecting the appointment of a representative, its licence may be revoked (s. 15). If such a corporation carries on in Ontario without a licence any part of its business, it is to incur a penalty of $50 a day, and is rendered incapable of suing in the Ontario Courts in respect of any contract made in whole or in part within Ontario in relation to business for which it ought to have been licensed (s. 16). The Lieutenant-Governor in Council may prescribe fees on the transmission of the statement or return required under s. 14. Such fees are to vary with the capital stock of the company (s. 20).

It is obvious that the Act thus summarised assumes that the Legislature of the Province can impose on a Dominion company conditions which, if not complied with, will restrict the exercise of its powers within the Province. These conditions do not appear to their Lordships to be merely a means for the attainment of some exclusively Provincial object, such as direct taxation for Provincial purposes. They apparently assume a general right to limit the exercise of the powers of extra-Provincial companies if they seek to exercise these powers within Ontario. A question of principle is thus raised broadly, and their Lordships now turn to the judgments in the Courts of Ontario in which it has been dealt with. In these Courts over this question there has been divergence of judicial opinion, and the question itself has been considered there with such thoroughness and ability that it is proper to refer to the diverging reasoning in some detail.

Masten J., before whom the cases came in the first instance,

was of opinion that in passing the Extra-Provincial Corporations Act the Legislature of Ontario had exceeded its powers. He pointed out that the Dominion Companies Act had vested in the companies incorporated under its provisions all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, and that, in view of the decision in the *John Deere Plow Case* (1), the power conferred on the Parliament of Canada to regulate trade and commerce, and to that extent to prescribe these capacities in cases affecting the Dominion at large, must be taken to be paramount and overriding. He thought that s. 7 of the Extra-Provincial Corporations Act afforded the keynote and the "pith and substance" of that Act, the purpose of which, as applied to Dominion companies, was to preclude them from the exercise of some of their powers and to deprive them of their status in Ontario unless a licence were obtained and certain fees paid there. However simple and little oppressive such a process might be, it constituted none the less a direct interference. It had been attempted to support this interference as justified by the powers conferred by s. 92 on the Provinces to raise revenue by direct taxation, to deal with property and civil rights, particularly from the point of view of mortmain, to legislate for the administration of justice, and to impose penalties in furtherance of these ends. But in the opinion of the learned judge these aspects of what had been included in the Provincial statute, except in the case of the mortmain law, had been introduced into it in reality only as ancillary to s. 7, and to the main purpose of asserting a direct control over the Dominion companies before permitting them to carry on their business in the Province. This purpose so permeated the whole Act that it was not practicable to hold certain of its sections valid and others invalid. The provision of s. 9, sub-s. 2, which excluded from any licence to be required limitations or conditions restricting the rights of the company to carry on in Ontario all such parts of its business and powers as by its Act or Charter of incorporation it might be authorized to exercise there, did not mend matters. But

(1) [1915] A. C. 330.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

the provisions of the Ontario Mortmain Act stood on a different footing. For the incapacity to hold lands did not arise because of the application of the Extra-Provincial Corporations Act, but because of the general scope of the Mortmain Act itself, a separate statute which the learned judge seemingly regarded as within the powers of the Province.

In the Supreme Court of Ontario, which heard the appeal from this decision, and from which an appeal has been brought directly to the Sovereign in Council, opinion was divided. The case was argued before five judges, the Chief Justice of Ontario, MacLaren J.A., Magee J.A., Hodgins J.A., and Ferguson J.A. By a majority of four to one, Ferguson J.A. dissenting, the judgment of Masten J. was reversed. It was declared that the Extra-Provincial Corporations Act was intra vires, excepting as to the words of s. 16, sub-s. 1, to the effect that the Dominion companies could not sue unless they had obtained Provincial licences. In agreement with Masten J. the Appellate Division held that the companies were bound to comply with the provisions of the Ontario Mortmain Act as a condition of occupying and holding lands in the Province.

Meredith C.J. made an able and exhaustive scrutiny of the legislation. He observed that it was well settled that, notwithstanding the Dominion having conferred on a company of its creation rights and powers, that company was subject to and bound to obey the laws of the Province with regard to taxation for Provincial purposes ; with regard also to contracts made within the Province, and as to the holding and tenure of land ; and that the exercise by the Province of its authority to pass such laws necessarily limits or restricts the power granted to the company by the Dominion. He then summarised the judgment of this Committee in *John Deere Plow Co.* v. *Wharton* (1), and stated one of its results as having been that as the provisions of the British Columbia statute there in question sought to compel the John Deere Plow Company to obtain a licence or to be registered in that Province, as a condition of exercising its power of suing in the Court of the Province, these provisions were ultra vires. The learned

(1) [1915] A. C. 330.

Chief Justice went on to interpret the reasons assigned by this Committee for their judgment. (1.) Notwithstanding the generality of the expression in s. 92 of the British North America Act, the words "civil rights" must be regarded as not covering cases expressly dealt with in s. 91 or even in s. 92 itself. (2.) Notwithstanding that a company has been incorporated by the Dominion with power to trade, it is not the less subject to Provincial laws of general application enacted under s. 92, including laws as to mortmain and payment of taxes, even though in the latter case the form assumed is that of requiring a licence to trade affecting Dominion companies in common with other companies, and including laws as to contracts. (3.) It might be competent for a Provincial Legislature to pass laws relating to companies without distinction, requiring those not incorporated within the Province to register for limited purposes, such as the furnishing of information or, under a general statute as to procedure, the giving security for costs. Meredith C.J. thought that the key to the decision was that the Judicial Committee were of opinion that the provisions of the British Columbia Act were not of these characters, but were directed to interfering with the status of Dominion companies and to preventing them from exercising the powers conferred on them by the Parliament of Canada. He referred to various earlier decisions of this Committee, and came to the conclusion that what was intended in the *John Deere Plow Co.* v. *Wharton* (1) was to lay down that it was not competent for a Provincial Legislature to single out Dominion corporations and to subject them to laws which were not applicable to all corporations. An important circumstance in that case was, he thought, that the Registrar had asserted power to refuse a licence unless the name were changed, an interference with the status of the company. As to this circumstance, he drew attention to what he regarded as an important difference between the British Columbia and the Ontario legislation. In the latter s. 9, sub-s. 2, precluded the insertion in the licence of any limitation or condition which would limit the rights of a corporation to carry on in Ontario

(1) [1915] A. C. 330.

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

such parts of the business and powers as by its Act or charter of incorporation had been authorized. The Chief Justice notices in passing that, by s. 15 of the Extra-Provincial Corporations Act, if a corporation receiving a licence makes default in observing or complying with its conditions or the provisions of s. 14 as to returns, or any regulations respecting the appointment of a representative in the Province, the licence may be revoked. He thinks that since the amendment made in the original form of the Act which is embodied in s. 9, sub-s. 2, just referred to, the words have now no meaning, and would have been eliminated but for the oversight of the draftsman. In his dissenting judgment, however, Ferguson J.A. takes the view that, even if the new section was meant to restrict the purpose of the Act, the words of s. 9, sub-s. 2, do not do so sufficiently to alter that purpose as remaining.

The Chief Justice was of opinion that the last part of s. 16, which precludes an extra-Provincial company which is unregistered from taking legal proceedings in Ontario in respect of a contract made in whole or in part in the Province, was ultra vires; in this the other members of the Court appear to have agreed with him. Subject to this exception he thought that the provisions of the enactment in question were of the character of "Provincial laws of general application," within the meaning of the decision in *John Deere Plow Co.* v. *Wharton*. (1) What was important was not the form, which need not be uniform. In substance, what was done was to impose a tax which was really lighter than that imposed on provincial companies. The other provisions of the Act were ancillary to this taxation, and it was no valid objection to what was done that, to the extent required for the exercise of powers specifically entrusted to the Provincial Legislatures, it, in a sense, restricted the exercise of powers conferred by Dominion authority. All laws imposing the necessity of obtaining licences and paying taxes, and of conforming to mortmain requirements, must do so. In the opinion of the Chief Justice the Act was not, in pith and substance, one designed to restrict Dominion companies "in the exercise

(1) [1915] A. C. 330.

of the powers conferred on them by the Dominion authority, but an Act lawfully passed for purposes as to which the Legislature by which it was enacted had authority to legislate." As to the Mortmain Act, he agreed with Masten J., that the law was one of general application and was binding on all companies which it purported to include. MacLaren J.A., Magee J.A., and Hodgins J.A. agreed in substance with the above conclusions.

Ferguson J.A. in effect agreed with the reasoning of Masten J. He was of opinion that the Act as originally enacted was passed on the assumption that it was within the legislative authority of the Province to control all extra-Provincial corporations, and that, notwithstanding that in its existing form amendments had been incorporated into the Act designed to mitigate this, the Act still embodied the object of general control. This was shown by the power given by s. 11 and by the regulations, which purported to enable the Lieutenant-Governor in Council to refuse a licence if the name of the company was objectionable in any of various respects.

Their Lordships defer making any observations on these judgments until they have dealt with the other cases. They only observe that with certain of the general propositions expressed by Meredith C.J. in his judgment they are in substantial agreement.

Their Lordships turn next to the case which has been brought forward as regards the legislation on the subject in Manitoba. In the Courts of that Province analogous questions were raised in a shareholder's action. The Attorney-General of the Province intervened in the course of the subsequent appeal.

In Manitoba there was passed in 1913 a general Companies Act, of which Part IV. deals with extra-Provincial companies and includes Dominion corporations. Under s. 108 every such corporation is required to take out a licence under this part of the Act, and by s. 109 (inter alia) such a corporation, on complying with the provisions of that part and with the regulations made under the Act, is entitled to receive a licence

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

to carry on its business and exercise its powers in Manitoba. By s. 111 (inter alia) such a corporation may apply to the Lieutenant-Governor in Council "for a licence to carry on its business or part thereof, and exercise its powers or part thereof, in Manitoba, and upon the granting of such licence such corporation may thereafter, while such licence is in force, carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the licence; subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the licence." On such an application the corporation is to file certain evidence and a power of attorney to someone in the Province appointing him to accept service. This is not to apply if the head office is within the Province (s. 114, sub-s. 3). By s. 118 no such corporation is to carry on within Manitoba any of its business, and no agent is to act for it, until a licence has been granted to it, and then only so long as this is in force. Sect. 120 requires annual returns of information to be made. By s. 121 the Lieutenant-Governor in Council may suspend or revoke the licence for default in observing the provisions of the Act. Sect. 122 provides, as in the case of the Ontario statute, for penalties for the carrying on of business in the absence of the licence, and incapacitates the corporation from suing without it in the Courts of the Province. Sect. 126 enables the Lieutenant-Governor to fix the fees to be paid. These are for the exchequer of the Province, and are to vary in part according to the nature and importance of the business to be carried on in the Province, and in part according to the amount of the entire capital stock of the corporation. In addition to these provisions, s. 112 enables a duly licensed corporation to hold real estate in the Province, but limited, in its licence, by s. 113 to such annual value as may have been deemed proper, as fully as if it had been a Manitoba company under the general Act. There is no Mortmain Act in the Province, but the registration of titles to land requires a licence and the registration of title to real estate in the case of extra-Provincial companies.

Thus there does not appear to be anything in the form or substance of the Manitoba Act which differentiates it materially from the corresponding Ontario Act.

The Manitoba case was heard in the Courts of the Province in the same year, 1917, as the Ontario case, but a little earlier. Macdonald J., the judge of first instance, decided in favour of the validity of the legislation, but apparently without giving reasons. On appeal the Court of Appeal of the Province was evenly divided, with the result that the appeal was dismissed. Howell C.J. and Cameron J.A. were for affirming, while Perdue J.A. and Haggart J.A. were for reversing.

Howell C.J. began his judgment by pointing out that the Province derives part of its revenue from charges for the incorporation of companies and for licences, and that all companies doing business in Manitoba, no matter where incorporated, have to pay what is sometimes called a tax and at others a fee for a licence. He thought that the Manitoba statute should be taken to have been enacted " for the purpose of completing the Provincial scheme of direct taxation for the general purposes of the Province by a general charge or tax on all corporations, as in *Bank of Toronto* v. *Lambe*. (1) " The decision in that case also disposed, in the view of the learned Chief Justice, of the argument that the discretionary power of prescribing conditions and limitations constituted an objection to the validity of the scheme of the Act, for there was no power to refuse a licence generally, like that in the British Columbia statute.

Cameron J.A. also dwelt on this distinction, and on the more restricted scope of the Manitoba Act in other points. As to the imposition of penalties, that carried the matter no further, for the true test was whether the substantive provision was authorized by s. 92. He arrived at the conclusion that the Companies Act was one the legislation in which was of such a general character as was saved by the decision in *John Deere Plow Co.* v. *Wharton* (2), being in reality wholly directed to subjects entrusted to the Provincial Legislatures by s. 92 of the British North America Act.

(1) 12 App. Cas. 575. (2) [1915] A. C. 330.

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

Perdue J.A. dissented. Sect. 111, enabling the Lieutenant-Governor in Council to insert in the licence limitations and conditions as to the exercise of the company's powers within the Province, showed that there was really no difference in this respect between the Manitoba Act and that declared ultra vires in *John Deere Plow Co.* v. *Wharton*. (1) He thought that for the purposes of the question there decided the provisions of the two Acts were indistinguishable. The object of such statutes was, in his view, to restrain Dominion companies from exercising within the Province the rights conferred on them by their charters, unless licensed. Th) decisions of the Privy Council in *Bank of Toronto* v. *Lambe* (2e and the *Brewers and Maltsters' Association* v. *Attorney-General for Ontario* (3), were not really in point, for they only established that what had to be paid was in these cases in the nature of direct taxation. Here the Provincial Legislature had gone further and had failed to confine their legislation within the limits which were settled by the *John Deere Plow Case* (1) to be those of what was legitimate. Haggart J.A. concurred in this conclusion.

There was in this case, unlike that of Ontario, an appeal to the Supreme Court of Canada, which also heard an appeal from the Supreme Court of Saskatchewan. The judgments of the Supreme Court of Canada, dismissing both appeals, were given on the same date, Idington J., Anglin J., and Brodeur J. taking one view, and the Chief Justice and Mignault J. dissenting. It will be convenient to reserve consideration of these judgments until reference has been made to the Saskatchewan cases, which were disposed of along with those from Manitoba.

The four Saskatchewan Companies Acts, now operative, differ from those of Ontario and Manitoba in the circumstance that they were passed in 1915, 1916 and 1917, after the decision in *John Deere Plow Co.* v. *Wharton* (1) by this Committee. It is the first of these four Acts that alone is important for the purposes of the present question. This is a general

(1) [1915] A. C. 330. (2) 12 App. Cas. 575.
(3) [1897] A. C. 231.

Companies Act, the provisions in which have nothing unusual in them, but which extends to (inter alia) Dominion companies having gain for their object, and carrying on business in the Province. The effect of s. 23 is that a Dominion company of this nature must be registered under the Act, and that if it does not register, the Dominion company and its representatives are liable to penalties for carrying on business in the Province. The effect of s. 24 is that registration cannot be refused to a Dominion company. By s. 25 the company may, on complying with the provisions of the Act, receive an annual licence, for which it is to pay fees to the Government of the Province, and may then carry on its business, subject to the provisions of the instrument creating it, as if it had been incorporated under the Act; but a company carrying on business without a licence is liable to penalties. By s. 27 the Lieutenant-Governor in Council may prescribe such regulations as he may deem expedient for the registration of all companies, and for fixing the fees payable. By s. 29 if the Registrar thinks that a company registered has ceased to carry on business he may, after finding on inquiry that this is so, strike the company off the register, whereupon it is dissolved; but by an amending Act passed since the commencement of these proceedings the provision as to dissolution is to take effect only as to Saskatchewan companies. By s. 30 if the prescribed fee is not paid the company may be struck off the register.

Proceedings were taken in Saskatchewan before a Justice of the Peace against a Dominion company for not being licensed or registered, and an action was brought by a shareholder, as in the cases of the other Provinces already referred to. The substantial question was again the validity of the Provincial statute, and this statute Elwood J. the judge of first instance, held to have been validly enacted. On appeal the Supreme Court of Saskatchewan, en banc, consisting of Haultain C.J., Newlands J., Lamont J., Brown J., and McKay J. dismissed the appeal unanimously. On appeal to the Supreme Court of Canada that Court also unanimously dismissed the appeal. Elwood J. thought that the fees

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

imposed were direct taxation, and that there was no prohibition of carrying on business without licence or registration, but merely a penalty, which did not interfere with the status of the company.

The judgment of the Supreme Court of Saskatchewan was delivered by Newlands J. He pointed out that the form of the existing Act, which was passed in 1915, after the decision of the Judicial Committee in the *John Deere Plow Case* (1), made it evident that the legislature of the Province had endeavoured to get rid of what might have been held to be objectionable in older legislation. For example, the old provision had been dropped, according to which any company required to be registered should not, while unregistered, be capable of suing in the Courts of the Province. It was true that there was still a provision that every company carrying on business in the Province without a licence was to be guilty of an offence and liable to a penalty ; but this did not necessarily render its contracts void. The prohibition of a particular act under a penalty was altogether different from requiring a general regulation to be complied with under a penalty. It was not really the intention of the legislature to prevent the company from doing business, but only to designate what companies were to be registered and pay licence fees. The status and powers of the Dominion company were therefore not affected.

In the Supreme Court of Canada the decisions in the Saskatchewan and Manitoba cases were reviewed and affirmed. There was no appeal brought there from the Ontario judgment, but the decision of the Ontario Appellate Division had been given more than a year previously and the reasons for it were alluded to in the Supreme Court of Canada in the other cases. It will be convenient to consider together the judgments in the other two cases, which were delivered on the same day.

In the Manitoba appeal the Chief Justice of Canada dissented and would have reversed. For he took the same view as Perdue J.A. had expressed in the Court below. He thought that the Manitoba Act, if valid, would deprive the Dominion

(1) [1915] A. C. 330

companies of their status and powers, notwithstanding that the provision in s. 18 of the British Columbia Act prohibiting the registration of an extra-Provincial corporation with a name of which the Registrar disapproved did not occur in the Manitoba Act. But while he formed this opinion about the Manitoba Act he thought otherwise about that of Saskatchewan, which he held had been so framed as to get over the difficulties indicated in the decision in the *John Deere Plow Case*. (1) His view was that in the latter Act the provisions were confined to the levying of direct taxation, and that its construction was such that if a Dominion company paid the tax it could carry on business without taking out a licence. But while arriving at this conclusion he stated that he had done so with difficulty and doubt, and that he considered the statute objectionable in form, though not in essence. Anglin J. expressed an opinion similar in doubt as to the Manitoba legislation, but on the whole he thought that the decision in the Manitoba case might be affirmed, though he arrived at that conclusion only after doubt. As to the Saskatchewan appeal he thought the provisions of the Act there distinguishable, and he concurred in the reasons given by his colleagues for the dismissal of the appeal. Brodeur J. laid much stress in the Manitoba case on the title of the Dominion company to have a licence as of right. The licence he considered to be a mere method of effecting direct taxation. He took the same view of the Saskatchewan legislation. The obligation of a Dominion company to take out a licence was under a law of general application, and was a mere means of taxation. He concurred in the dismissal of both appeals. Idington J. agreed. The cases seemed to him to turn on the same question, whether a Provincial Legislature could tax a Dominion company. He thought the earlier decisions of the Judicial Committee had established that it could do so in this kind of form. No one of the enumerated powers in s. 91 enabled the Dominion Parliament to entitle a Dominion company to escape from the obligations of a private citizen in the Province. Mignault J. agreed as regards the

(1) [1915] A. C. 330.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

Saskatchewan appeal. The statute there was a pure taxing statute, and the Dominion companies were not prohibited from carrying on business in the Province, but were merely subjected to a penalty for not taking out a licence. In the Manitoba case he dissented from the majority, and thought that there should be a reversal. For the companies were by the statute there compelled to take out a licence as a condition of exercising their powers in the Province, and of invoking the jurisdiction of its Courts. He agreed with the view taken by Perdue J.A. in the Court below.

Their Lordships have thus examined in some detail the course of the proceedings in the cases under consideration, and have stated the substance of the various judgments given. There has been much divergence of opinion in these judgments. It has arisen over the single question which is the crucial one in these appeals. Can the relevant provisions of all or any of the three sets of Provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by s. 92 to the Legislatures, such as is the collection of direct taxes for Provincial purposes ; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status ? The question is one primarily of the interpretation of the British North America Act and in the second place of the meaning of the principle already laid down by this Committee in the *John Deere Plow Case*. (1) The constitution of Canada is so framed by the British North America Act that the difficulty was almost certain to arise. For the power of a Province to legislate for the incorporation of companies is limited to companies with Provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every Province. But such a power is covered by the general enabling words of s. 91, which, because of the gap, confer it exclusively on the Dominion. It must now be taken as established that s. 91 enables the Parliament of Canada to incorporate companies with such

(1) [1915] A. C. 330.

status and powers as to restrict the Provinces from interfering with the general right of such companies to carry on their business where they choose, and that the effect of the concluding words of s. 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the Provincial legislatures of their capacities under the enumerated heads of s. 92. It is clear that the mere power of direct taxation is saved to the Province, for that power is specifically given and is to be taken, so far as necessary, on a proper construction to be an exception from the general language of s. 91, as was explained by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons.* (1) Nevertheless, the methods by which the direct taxation is to be enforced may be restricted to the bringing of an action, with the usual consequences, which was all that was decided to be legal in *Bank of Toronto* v. *Lambe.* (2) It does not follow that because the Government of the Province can tax it can put an end to the existence or even the powers of the company it taxes for non-compliance with the demands of the tax-gatherer. Their Lordships find themselves unable to agree with an observation made by Meredith C.J. towards the conclusion of his judgment. "It is," he says, "I think to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each Province the power of determining how far, if at all, those powers should be exercised within its limits." Such a construction would have left an hiatus in the British North America Act, for there would have been in the Act so read no power to create a company with effective powers directed to other than merely Provincial objects. It was decided as long ago as 1883, in *Colonial Building Investment Association* v. *A.-G. for Quebec* (3) that there was no such hiatus. Nor does it appear, if reference

(1) 7 App. Cas. 108. (2) 12 App. Cas. 575.
(3) 9 App. Cas. 157.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

may be made as matter of historical curiosity to the resolutions on which the British North America Act was founded, and which were passed at Quebec on October 10, 1864, for the guidance of the Imperial Parliament in enacting the Constitution of 1867, that these resolutions gave countenance to the idea that a different construction on the point in question was desired. The learned Chief Justice refers to them without quoting their language. But, in connection with the topic in controversy, all that was desired by the words of these resolutions to be assigned to the Provincial Legislatures was "the incorporation of Private or Local Companies, except such as relate to matters assigned to the General Parliament."

In *Tennant* v. *Union Bank of Canada* (1) it was decided that the British North America Act must be so construed that s. 91 conferred powers to legislate which might be fully exercised even though they modified civil rights in a Province, provided that these powers are clearly given. The rule of construction is that general language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous. The rule may also apply in favour of the Province in construing merely general words in the enumerated heads in s. 91. For, to take an example, notwithstanding the language used at the end of s. 91, the heading in that section, "Marriage and Divorce," was interpreted on an appeal to this Committee in the *Marriage Laws Case* (2) as being pro tanto restricted by the provision of s. 92 which entrusted the making of laws relating to the solemnization of marriage to the Provincial Legislatures. Whether an exception is to be read in either case depends on the application of the principle that language which is merely general is, as a rule, to be harmonized with expressions that are at once precise and particular by treating the latter as operating by way of exception. The two sections must be read together, and the whole of the scheme for distribution of legislative powers set forth in their language must be taken into account in determining what is merely general and what is particular

(1) [1894] A. C. 31. (2) [1912] A. C. 880.

in applying the rule of construction. For neither the Parliament of Canada nor the Provincial legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact. The decision in 1896 of *A.-G. for Ontario* v. *A.-G. for Canada* (1) is a good illustration of the fashion in which the rule of construction thus stated has been interpreted and applied.

It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character. *Madden* v. *Nelson, etc. Ry. Co.* (2), and *Canadian Pacific Ry. Co.* v. *Notre Dame de Bonsecours* (3), are excellent illustrations of how this has been done. In the first-mentioned case a Provincial Legislature, by a Cattle Protection Act, sought to make a Dominion railway company liable for injury to cattle straying on the line within the Province, unless they had erected proper fences. It was held that the Province had no power to impose liability on the Dominion railway companies as such for the provision of works. It was pointed out in the latter case that a very different point really arose—namely, that although any direction by a Provincial Legislature to a Dominion railway company to alter the construction of the drains on its works would be ultra vires, still the railway company were not exempted from the obligation of a Provincial law applicable to all land owners, without distinction, that they should clean out their ditches so as to prevent nuisance.

In cases such as those referred to the rule of construction above stated has been applied wherever possible. It is only where there is actual inconsistency that the effect of the concluding words of s. 91 can be invoked. *A.-G. of Manitoba* v. *Manitoba Licence Holders' Association* (4) is yet another useful illustration. The legislature of Manitoba had enacted the prohibition of transactions in liquor to take place wholly within the Province, with the saving of bona fide transactions

(1) [1896] A. C. 348.
(2) [1899] A. C. 626.
(3) [1899] A. C. 367.
(4) [1902] A. C. 73.

J. C. 1921 GREAT WEST SADDLERY CO. v. THE KING.

between persons in the Province and those in other Provinces or in foreign countries. It was held that such legislation was valid as falling within head 16 of s. 92, "matters of a merely local or private character in the Province," notwithstanding that its effect would be to interfere consequentially with sources of Dominion revenue and with business operations beyond the Province. *Union Colliery Co.* v. *Bryden* (1) and *Cunningham* v. *Tomey Homma* (2) also furnish illustrations of how the rule of construction under consideration has been applied.

The only other decision to which their Lordships desire to make reference is that in *Brewers and Maltsters' Association* v. *A.-G. for Ontario.* (3) There the Dominion Legislature had previously and validly regulated the manufacture and wholesale vending of spirituous liquors, and provided for the issue of licences for such manufacture and sale. Ontario had subsequently passed an Act requiring every person so licensed by the Dominion also to obtain a licence for sale from the Province, and to pay a fee for it. It was held in the first place that this was direct taxation for provincial purposes, and therefore within the power of the Province, and secondly that the licence was such as to be authorized among the "other licences" included in the general words of head 9 of s. 92—"shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial purposes." Their Lordships think that what is implied in this decision is that while the Dominion Legislature had power to place restrictions throughout Canada on the traffic in liquor, the powers conferred by s. 91 did not in any way conflict with the positive powers of taxation and licensing for Provincial objects, expressly and particularly conferred by s. 92. These, in so far as there might have been any interference, had been conferred by the Imperial Parliament on the Provinces by way of exception both from the general power of legislation given to the Dominion by the initial words of s. 91, and from any purely general enumerated head, such as the regulation of trade and commerce.

(1) [1899] A. C. 580. (2) [1903] A. C. 151.
(3) [1897] A. C. 231.

The principle of interpretation to be followed in applying the test laid down in the *John Deere Plow Co. Case* (1), that Provincial legislation cannot validly destroy the status and powers conferred on a Dominion company by Act of the Parliament of Canada, does not appear to be obscure when read in this light. Turning to its application, the first thing to be observed is the nature of the questions to be answered. Their Lordships will dispose in the first place of a subsidiary matter, which is whether a Dominion company can be precluded from acquiring and holding land in a province by a Provincial law of the nature of a general Mortmain Act. It is clear, both on principle and from previous decisions, that it is within the competence of a Provincial Legislature to enact such legislation, and the question is therefore answered in the affirmative. If there be a provision to this effect, occurring even in a statute which in other respects is ultra vires, and that provision be severable, it is valid. In the Ontario case there is therefore no doubt that the broad result of the contention of the Province under this head is well founded; for there the Legislature has passed a Mortmain Act of general application, and in regard to this Act a Dominion company is in no better position than any other corporation which desires to hold land.

In Manitoba there is no general Mortmain Act, but s. 112 of the Manitoba Companies Act enables a corporation receiving a licence under Part IV. of the Act, relating to extra-Provincial companies, to acquire and hold land as freely as could any company under Part I. of the Act. Even if the provision as to the licensing of extra-Provincial companies is held to be ultra vires, so as to prevent such a provision from being operative, as being inseverable, it is plain that the substance of a provision which is of the character of a mortmain law is within the power of the Province.

In Saskatchewan there is no general Mortmain Act, but the Companies Act of 1915, by s. 19, enables a company incorporated under the law of the Province to hold land. By s. 25 a company not so incorporated (and this includes a Dominion company) may, if it has been licensed, carry on its business as

(1) [1915] A. C. 330.

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

if it had been incorporated under the law of the Province. This enables it to hold land unless the provisions as to the grant to it of a licence are inoperative. Their Lordships do not think that s. 29 of the Companies Act of Canada, which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, can prevail against any severable provision by a Provincial Legislature restricting the power of corporations generally to acquire or hold real estate in the Province.

Their Lordships now pass to the question of a more general order, which is the main one in these appeals. Had the Provinces of Ontario, Manitoba and Saskatchewan power to impose on Dominion companies the obligation to obtain a licence from the Provincial Government as a condition of the exercise in those Provinces respectively of the powers conferred on them by the Dominion?

If the condition of taking out a licence had been introduced, not so as to affect the status of the Dominion company, but simply for the purpose of obtaining payment of a direct tax for Provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the Province, or of causing the doing, by that public generally, of some act of a purely local character only under licence, their Lordships would, for reasons already given, have been prepared to regard the condition as one which it was within the power of the Province to impose. Even then it would have been requisite to see, as was pointed out by Lord Herschell, in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case* (1), that the Provincial Legislature was not, under the guise of imposing such direct taxation in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance attempted, their Lordships hold themselves unfettered. If, for example, such a question were to arise hereafter, involving consideration of whether the real effect of the licence required by a Provincial

(1) [1897] A. C. 231, 237.

law has been to abrogate capacity which it was within the power of the Parliament of Canada to bestow, or whether for a breach of conditions a Provincial Legislature could impose, not an ordinary penalty but one extending to the destruction of the status of the company and its capacity in the Province, nothing that has been here said is intended to prejudice the decision of such a question, should it occur. It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

What remains is to apply the principle of the decision in the *John Deere Plow Case* (1) as so interpreted to the actual Provincial legislation challenged.

As to Ontario, the statute impugned is the Extra-Provincial Corporations Act in its application to Dominion companies. Their Lordships have come to the conclusion that the real effect of this Act, as expressed or implied by its provisions, is to preclude companies of this character from exercising the powers of carrying on business in Ontario, to the same extent as in other parts of Canada, unless they comply with a condition sought to be imposed, that of obtaining a licence to do so from the Government of the Province. By s. 7 such companies are expressly prohibited from doing so, and the provision in s. 9, sub-s. 2, that no limitations or conditions are to be included in such a licence as would limit a Dominion company, for example, from carrying on in the Province all such parts of its business, or from exercising there all such parts of its powers, as its Act or charter of incorporation authorizes, does not in their Lordships' opinion sufficiently mend matters. For the assertion remains of the right to impose the obtaining of a licence as a condition of doing anything at all in the Province. By s. 11 the grant of the licence is made dependent on compliance with such regulations as may happen to have been made by the Lieutenant-Governor in Council under ss. 2 and 10 of the Act. By s. 16, and also under s. 7 itself an extra-Provincial corporation required to take out a licence is to be fined for not doing so, and, under s. 16, is to be incapable of suing in the Courts of the Province. Their Lordships are

(1) [1915] A. C. 330.

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

of opinion that these provisions cannot be regarded as confined only to such limited purposes as would be legitimate, and that they are therefore ultra vires.

Taking next the Companies Act of Manitoba, Part IV. of this Act deals with extra-Provincial corporations, including Dominion companies. The effect of the scheme of this part does not appear to their Lordships to differ in any feature that is material from that of the Ontario Act. Inter alia, a Dominion company must take out a licence, which it is entitled to receive if it complies with the provisions of the Act and with regulations to be made by the Lieutenant-Governor in Council. There may, under s. 111, be limitations and conditions specified in the licence, and if the company makes default in complying with these or certain other provisions, the licence may be revoked under s. 121. Unless the company obtains a licence it cannot, nor can any of its agents, carry on business in Manitoba. Penalties are imposed for carrying on business without a licence, and so long as unlicensed the company cannot invoke the jurisdiction of the Courts of the Province. It does not alter the scope of these provisions that by s. 126 fees are payable for the licence, to be applied to the benefit of the revenue of the Province.

Their Lordships are unable to take the view that these sections regarded together are directed solely to the purposes specified in s. 92. They interpret them, like those of the Ontario statute, as designed to subject generally to conditions the activity within the Province of companies incorporated under the Act of the Parliament of Canada. The restriction in this statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make those restrictions enforceable as being in the nature of Mortmain legislation.

The statute remaining to be considered is that passed by the Legislature of Saskatchewan in 1915, a general Companies Act which, however, contains provisions applicable to Dominion companies. By s. 23, if such companies carry on business in Saskatchewan, they must be registered under this Act, and if they carry on business without registering, the companies,

and also the agents acting for them, are made liable on summary conviction to penalties. By s. 24 such companies are entitled to be registered on complying with the provisions of the Act and on paying the prescribed fees. There are also payable annual fees. By s. 25 such companies may upon certain conditions receive a licence to carry on business in Saskatchewan, and if they carry on business without a licence are guilty of an offence and liable to penalties. By s. 29, where the Registrar satisfies himself in the prescribed manner that a company registered under the Act has ceased to carry on business, he may strike the company off the register, and it is then to be dissolved. By s. 30, if the registration fees prescribed by the regulations made by the Lieutenant-Governor in Council be not paid, the Registrar is to strike the company off the register.

Here again their Lordships think that the Provincial Legislature has failed to confine its legislation to the objects prescribed in s. 92, and has trenched on what is exclusively given by the British North America Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the Provincial register and to pay fees not exceeding those payable by Provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the Province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Saskatchewan Companies Act or shall become liable to dissolution under s. 29, the Act would be open to question on that ground ;

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

but it is right to say that such a construction was disclaimed by counsel for the Attorney-General of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Sect. 25 of the Saskatchewan Act, which requires a Dominion company to obtain a licence, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as ultra vires; and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

The result is that their Lordships take the view which commended itself to a minority of the judges in the Courts below, and find themselves unable to agree on the main question argued, either with the preponderating opinion expressed in the Supreme Court of Canada on the Saskatchewan and Manitoba legislation, or with that of the majority of the Appellate Division in Ontario on the validity of the statute of that Province, but that on the subsidiary question as to the Mortmain Act of Ontario they agree with the Ontario Courts.

The proper course will be to allow the appeals and to declare :—(1.) That in the case of all four appellant companies the provisions of the parts of the Provincial Companies Acts which were the subject of the proceedings in the Courts of the Provinces of Ontario, Manitoba and Saskatchewan, in so far as they purport to apply to the appellant companies respectively, are ultra vires of the Provincial Legislatures in each case, and that these companies are not precluded by reason of not having been licensed or registered under those Acts from carrying on business and exercising their powers in the three Provinces, and are not liable to the penalties prescribed for having so carried on business and exercised their powers. (2.) That in the case of the Province of Ontario none of the appellant companies can acquire and hold lands in the Province without a licence under the Provincial Mortmain Act, and that it is within the power of the other Provincial Legislatures to impose the requirement of a licence directed to this purpose. The judgments of Masten J. in the Ontario cases will be restored, and the other proceedings dismissed.

J. C.
1921
GREAT WEST SADDLERY CO. v. THE KING.

As regards costs their Lordships were informed that in the cases in the Courts below it was in certain of the proceedings agreed that there should be no costs. Having regard to the character of the questions raised, and to the circumstance that on one important point, that as to mortmain, the whole of the contentions of the appellants have not been successful, they think that there should be no costs for any of the parties, either of these appeals or in any of the Courts below.

They will humbly advise His Majesty in accordance with what has been said.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents : *Blake & Redden ; Freshfields & Leese.*

Solicitors for interveners : *Charles Russell & Co. ; Freshfields & Leese ; Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1921
May 2.

CONDOGIANIS . . . . . APPELLANT ;

AND

GUARDIAN ASSURANCE COMPANY, LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Insurance (Fire)—Warranty—Proposal Form—Answer literally True—Untruth in Substance—Materiality—Construction of Policy.

The appellant sued the respondents upon a policy issued by them insuring certain laundry premises against fire. A proposal form filled up by the appellant when applying for the policy contained the following question : "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed, or any other property ? If so, state when and name of company." The appellant's answer was "Yes. 1917. 'Ocean.'" That answer was literally true, as in 1917 he had claimed against the Ocean Insurance Co. in respect of the burning of a motor-car ; but in 1912 he had made a claim against another company in respect of a similar loss. The proposal form stated that it was the

* *Present :* VISCOUNT HALDANE, LORD BUCKMASTER, and LORD SHAW.

J. C.
1921
CONDOGIANIS
v.
GUARDIAN ASSURANCE CO.

basis of the policy, and that the particulars given by the appellant were to be express warranties. The policy contained a condition that if there was any misrepresentation as to any fact material to be known in estimating the risk the respondents were not to be liable upon the policy :—

Held, that the answer was untrue since the question could not reasonably be read as being intended to have the limited scope which would render the answer true ; that there was a breach of warranty, whether or not the misrepresentation was as to a material fact ; and that the appellant could not recover on the policy.

Judgment of the High Court affirmed.

APPEAL by special leave from a judgment (June 17, 1919) of the High Court of Australia, reversing a judgment of the Supreme Court of Victoria.

The appellant brought an action against the respondents in the Supreme Court of Victoria for a declaration that a policy of fire insurance issued to him by the respondents and dated March 1, 1916, was a valid and subsisting policy, and that he was entitled to be indemnified by the respondents thereunder in respect of the loss or damage occasioned by fire to certain stock in trade, fixtures, fittings, and machinery on certain laundry premises described in the policy.

The facts, including the material terms of the policy, are stated in the judgment of their Lordships.

The trial judge (Hodges J.) gave judgment for the appellant, but that judgment was reversed by the High Court (Barton and Gavan Duffy JJ., Isaacs J. dissenting). The appeal is reported at 26 C. L. R. 531.

1921. April 21. *Clauson K.C.* and *Micklethwait* for the appellant. There was no breach of warranty. The answer to the question whether a previous claim had been made and if so when, was not untrue and contained no misrepresentation. No mala fides was suggested. Even if the question was capable of being construed in two ways the appellant was justified in reading it literally. Ambiguous questions put forward by a proposal form are to be construed contra proferentes : *Joel* v. *Law Union and Crown Insurance Co.* (1) ; *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (2) ;

(1) [1908] 2 K. B. 863, 886. (2) [1909] 1 K. B. 591, 596.

In re Bradley and Essex and Suffolk Accident Indemnity Society (1); *National Protector Fire Insurance Co.* v. *Nivert.* (2) The appellant having truly answered the question according to a possible construction which he bona fide gave to it performed his obligation. Further, the failure to mention the claim in respect of the motor-car in 1912 was not material to the risk insured. The policy contained an express condition that if there was "any misrepresentation as to any fact material to be known for estimating the risk" the company should not be liable. That condition limited the effect of the provisions in the proposal form so that only statements which were material were to be warranties: *Burnside* v. *Melbourne Fire Office.* (3) The answer to the question as to the ownership of the premises was true, the partnership contract left the ownership of the premises in the appellant. Even if the answer was technically incorrect, the inaccuracy was not material to the risk.

Sir John Simon K.C., *G. Lawrence* and *C. Asquith* for the respondents were not called upon.

May 2. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal by special leave from a judgment of the High Court of Australia dated June 19, 1919, allowing by a majority of two judges to one an appeal from the judgment of Hodges J., in the Supreme Court of Victoria, dated October 30, 1918. Isaacs J. agreed with the judge of first instance; Barton and Gavan Duffy JJ., from whom he dissented, decided to reverse.

The action, which was brought by the appellant as plaintiff, claimed a declaration that, under a policy of insurance of the defendant company, dated March 1, 1918, that company was liable to pay to him the loss sustained in consequence of a fire which occurred on April 17 of that year and by reason of which a large part of the property insured was destroyed.

In the pleadings the defence was rested on a variety of grounds. At their Lordships' bar the learned counsel for the

(1) [1912] 1 K. B. 415, 430. (2) [1913] A. C. 507, 513.
(3) [1920] V. L. R. 56.

J. C.
1921
CONDOGIANIS
v.
GUARDIAN ASSURANCE CO.

respondents stated that it was sufficient to rely upon one of these grounds, and that all the others might be taken as discarded. This ground was that two statements made in the proposal were untrue. One of these statements stood opposite the following, being a request for the "name in full, residence and occupation, of the person in whose name the policy is to be made out." The appellant, Nicholas Condogianis, signed his name and gave his address. There was, however, a printed note attached and clearly made a condition of the policy, to the following effect: "If not the owner, the nature of interest must be stated." The truth was that the appellant, prior to the date of the policy, had entered into a contract of partnership with one Mrs. Rachor. The deed of partnership is produced, and it appears from it that the partners are equally entitled to the profits of the concern. It further appears, however, that Mrs. Rachor's contribution to the firm's capital was of a very slender amount, and on this and other grounds the appellant maintained that his representation, which amounted to an assertion of his own ownership, was substantially true. Whether such a contention could be successfully maintained or not their Lordships do not propose to determine, as they have formed a clear conclusion upon the other ground now to be mentioned, which formed the staple part of the argument before the Board, as also of the judgments of the learned judges of the Court below.

That ground is this: Among the questions in the appellant's fire insurance proposal to the respondents was the following: "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed or any other property? If so, state when and name of company." To this the answer was given: "Yes. 1917. 'Ocean.'"

This answer was in a literal sense true—that is to say, it was true that the proposer had in the year 1917 made a claim against the Ocean Insurance Co. in respect of the burning of a motor-car. He omitted, however, to state what was also the fact—namely, that in the year 1912 he had made another claim against the Liverpool and London and Globe

Co. in respect of the burning of a motor-car owned by him. He was paid the sum of 267*l.* 3*s.* in settlement of that claim.

It is unnecessary to state that the answer given by the appellant in the proposal falls clearly within the express declaration which is now to be quoted. The terms of that declaration are as follows: "This proposal is the basis of the contract and is to be taken as part of the policy and (if accepted) the particulars are to be deemed express and continuing warranties furnished by or on behalf of the proponent; and any questions remaining unanswered will be deemed to be replied to in the negative. The proposal is made subject to the Company's conditions as printed and/or written in the policy to be issued hereon, and which are hereby accepted by the proponent."

The case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves—by making the fact the basis of the contract, and giving a warranty—that as between them their agreement on that subject precluded all inquiry into the issue of materiality. In the language of Lord Eldon in *Newcastle Fire Insurance Co.* v. *Macmorran* (1): "It is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing."

This rule has been repeated over and over again, and is too well settled to be questioned: *Anderson* v. *Fitzgerald* (2), and the judgments of Lord Blackburn and Lord Watson in particular in *Thomson* v. *Weems.* (3)

An argument was presented to the Board arising from the

(1) (1815) 3 Dow, 255, 262. (2) (1853) 4 H. L. C. 484.
(3) (1884) 9 App. Cas. 671, 683, 687.

J. C. 1921 — CONDOGIANIS v. GUARDIAN ASSURANCE CO.

language used in the first condition of the policy. It is as follows: "If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the Company shall not be liable upon this Policy so far as it relates to property affected by any such misdescription, misrepresentation or omission."

It was pleaded that the materiality of the fact was thus introduced into the policy in the sense of making the materiality of every statement or answer part of the basis of the contract. It is no doubt true that a material misstatement inducing the contract would avoid it, but their Lordships see no reason to hold that the reference to materiality in the condition quoted is in any sense equivalent to a deletion of the warranty and declaration of the basis of the contract which the signed proposal contains. That argument is accordingly rejected.

The more serious proposition arose on the construction of the question and answer. In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by Courts of law. Their Lordships accept that doctrine to the full, and no question is made of the soundness of it as set forth in many authorities, of which the judgments of Vaughan Williams L.J., in *Etherington's Case* (1), and Moulton L.J., in *Joel* v. *Law Union and Crown Insurance Co.* (2) are recent examples.

But upon the other hand, the principle of a fair and reasonable construction of the question must also be applied in the

(1) [1909] 1 K. B. 591, 596. (2) [1908] 2 K. B. 863, 886.

other direction—that is to say, there must also be a fair and reasonable construction of the answer given; and if on such a construction the answer is not true, although upon extreme literalism it may be correct, then the contract is equally avoided. These principles seem to be entirely in accord with Lord Watson's view in *Thomson* v. *Weems*, which was thus expressed: "Notwithstanding that the warranty is express there still remains for consideration what must be held to be the subject-matter of the warranty. That is a point to be determined in each case, according to the just construction of the question and answer taken per se and without reference to the warranty given." (1)

With these matters in view, what is a just and reasonable construction of the words in the question, "Has proponent ever been a claimant on a fire insurance company? If so, state when and name of company"?

It is not to be wondered at that this was made the basis of the contract, because insurance companies might hesitate long before entering into a contract with an insurer who had been formerly a claimant upon companies, and they would have been put upon their inquiry as to what these claims were and how they had been settled and what were the circumstances of these former transactions. The importance of the question might be increased by the number of times in which such transactions had taken place. The argument of the appellant, however, was that it was sufficient to answer the question, "Has proponent ever been a claimant . . . . ? If so, state when and name of company"? by answering in the singular and giving one occasion and one occasion alone. Accordingly, if, say, several years ago a proponent had been a claimant under an insurance policy, it would be sufficient for him to mention that fact and to exclude from mention the further fact that every year since that occasion he had also been a claimant upon insurance companies for fire losses. It appears to their Lordships quite plain that this would be no good answer to the question, "Has proponent ever been a claimant? If so, state when"? In short, when that question

(1) (1884) 9 App. Cas. 671, 683, 687.

J. C.
1921
CONDOGIANIS
v.
GUARDIAN ASSURANCE CO.

is reasonably construed, it points to the insurer getting the benefit of what has been the record of the insured with regard to insurance claims. This was distinctly its intention and in their Lordships' opinion is plainly its meaning. To exclude, however, from that record what might in the easily supposed case be all its most important items, however numerous these might be, and to answer the question in the singular, which again in the easily supposed case might be a colourless instance favourable to the claimant, would be to answer the question so as to misrepresent the true facts and situation and to be of the nature of a trap.

On this simple ground, which is in accord with the spirit and principle of insurance law as frequently laid down, their Lordships see no occasion for interfering with the judgment of the majority of the Court below. They agree with the result arrived at by the learned judges Barton and Gavan Duffy JJ. They note with satisfaction that the learned judge, Isaacs J., although dissenting on the point of the construction of the particular question and answer above reviewed, is in substantial agreement with those principles of insurance law to which reference has been made. When he observes that "all a Court can do, in my opinion, is to determine the limits of reasonable interpretation," that may be at once assented to. But when he proceeds, "and if the proponent has bona fide understood the question within the limits and answered it accurately, that is sufficient," their Lordships feel that dangerous ground has been reached. However great the bona fides of the proponent may be, if he has been led to impose limits upon the question to which it should not reasonably be subject, then the answer so restricted cannot be held to be a true answer. The present affords a good illustration of a case in which the question should be stated so as to raise the issue in a broader and, in their Lordships' opinion, a just and sound form. That question would be, "Could a man making a proposal for insurance fairly read the question as applying only to a single previous claim?" Their Lordships, as stated, are clearly of opinion that such a limitation would result, not in

the disclosure which was truly required, but in a failure to reveal essential elements important to be known.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Freshfields & Leese.*

Solicitors for respondents: *Trower, Still, Parkin & Keeling.*

[PRIVY COUNCIL.]

J. C.* 1921 *May* 30.

WESTRALIAN POWELL WOOD PROCESS, LIMITED . . . . . } APPELLANTS;

AND

THE CROWN . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Patent—Commonwealth Patents Act—Application to State Patent—Contract relating to Licence—Contract with Crown—Power of Crown to determine Contract—"In the Commonwealth"—Patents Act, 1903–1909 (*No.* 21 *of* 1903 *and No.* 17 *of* 1909, *Cth.*), *s.* 4; *s.* 6; *s.* 87B, *sub-s.* 2.

The Patents Act, 1903–1909, of the Commonwealth, by s. 87B, sub-s. 2, provides that either party to a contract relating to a licence to use a patented article or process after the expiration of the patent may determine the contract by notice; s. 4 in defining "patent" uses the words "granted in the Commonwealth"; s. 6 preserves rights acquired before the commencement of the Act. Both under the above-mentioned Act and under the Patent Act, 1888, of Western Australia the Crown can use for the public service any patented article or process upon terms to be agreed or settled by arbitration.

The appellants were granted a patent under the Patent Act, 1888, of Western Australia, for a process; the patent was not extended to the Commonwealth. In 1912 they entered into a contract whereby they granted to the Government of Australia a licence to use the process until 1923 upon certain terms. In 1918 the patent terminated, and the Government gave notice to determine the contract:—

Held, that the Government of Australia could determine the contract under s. 87B, sub-s. 2, on the grounds: (1.) that the words "in the Commonwealth" in the definition of "patent" were used geographically; (2.) that as the contract was made after the commencement of the Act,

---

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, and LORD SHAW.

J. C.

1921

WESTRALIAN POWELL WOOD PROCESS, LD v. THE CROWN

s. 6 did not exclude the operation of s. 87B, sub-s. 2; and (3.) that the sub-section applied to the contract, as it was in terms a "licence," also because the word "licence" in the sub-section included a licence given by statute.

Judgment of the High Court affirmed.

APPEAL by special leave from a judgment of the High Court of Australia (October 29, 1919) reversing a judgment of the Supreme Court of Western Australia (May 7, 1919).

The appellants brought a petition of right in the Supreme Court of Western Australia, claiming damages for the repudiation by the Government of Australia of a contract dated February 27, 1912, providing for the use by the Government of a process for which the appellants had been granted a patent under the Patent Act, 1888, of Western Australia. The sole question arising on the appeal was whether the Government had the power to terminate the contract under s. 87B, sub-s. 2, of the Patents Act, 1903–1909, of the Commonwealth.

The facts and terms of the material enactments appear from the judgment of their Lordships.

The trial judge, Burnside J., held that having regard to s. 6 of the last-mentioned Act there was not power to determine the contract.

The High Court of Australia (Barton, Isaacs, and Rich JJ.) reversed the decision by a judgment delivered by Isaacs J. It was held that the definition of "patent" in s. 4 of the Act included a State patent, and that the operation of s. 87B, sub-s. 2, was not excluded by s. 6 (which preserves rights acquired before the passing of the Act) since the contract was not made until 1912. The appeal is reported at 27 C. L. R. 236.

An Order in Council dated March 3, 1920, granted special leave to appeal, reserving to the hearing of the appeal any question as to the competence of the appeal having regard to s. 74 of the Commonwealth of Australia Constitution Act, 1900.

1921. April 25. *Kerly K.C.* and *F. E. Bray* for the appellants. The Crown had not power to determine the contract. First, because s. 87B, sub-s. 2, of the Commonwealth

Patents Act applied only to Commonwealth patents. In the definition of "patent" in s. 4 the words "in the Commonwealth" are not used geographically; where the Act intends to refer to the whole continent, as in s. 60, the words "in Australia" are used; in ss. 41, 46, 56 (c) "Commonwealth" and "State" are used in contradistinction. Secondly, if s. 87B, sub-s. 2, applies as a matter of construction to a State patent, s. 6 which preserves pre-existing rights excludes the application in this case. The appellants were entitled to deal with their monopoly as if the Commonwealth Patents Act had not been passed. Their rights under the contract flowed from their patent: *Ore Concentration Co.* v. *Sulphide Corporation.* (1) Thirdly, the sub-section refers to a "licence," but here no "licence" is in question, because, both under s. 32 of the Western Australia statute, and under s. 92 of the Commonwealth statute, the Crown had the right to use the process. The contract was merely an agreement, such as is referred to in s. 32, settling the terms upon which the Crown could exercise the right. An application of the sub-section to an agreement between a patentee and the Crown would not accord with the policy underlying the sub-section.

Upjohn K.C. and *F. H. Swann* for the Crown. The contention that the instrument of 1911 was not a licence was not raised below, and cannot now be relied on. It depends upon facts which are not before the Board; for instance it is not clear whether the user under the contract was entirely for the public service so as to be as of right. But in any case, the contract was in terms a "licence," and the appellants are precluded from now saying that it was not one. Further, the word "licence" is not used in a technical sense in s. 87B, sub-s. 2. Sect. 6 does not create a saving applicable to this case, because the appellants' rights under their patent came to an end in 1918. Also because there was no interference with any right acquired by the appellants: *Starey* v. *Graham.* (2) The definition of "patent" in s. 4 includes a State patent, and the statute applies to State patents, save so far as s. 6 excludes it from so applying. The appellants' patent was

(1) (1914) 31 R. P. C. 206, 228. (2) [1899] 1 Q. B. 406, 411.

J. C. 1921 WESTRALIAN POWELL WOOD PROCESS, LD. v. THE CROWN.

one granted " in," not " by " or " for," " the Commonwealth." In s. 87A the words are used clearly in a geographical sense, and a consideration of the scheme and provisions of the Act shows that it is so used in the definition section.

Kerly K.C. in reply. The effect of s. 6 is that the Commonwealth statute does not apply to a State patent, save where the statute so provides expressly or by necessary implication.

May 30. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The appellants are the registered proprietors of letters patent for a process for the treatment and preservation of timber. They obtained the protection of letters patent issued under the Western Australia Patent Act, 1888, on February 9, 1904. On June 1, 1904, the Commonwealth Patents Act, 1903, came into operation, this statute being amended in 1909, and the Act of 1903–1909 became operative on December 13, 1909. On February 27, 1912, the appellants entered into a contract with the Minister for Works for the State of Western Australia acting on behalf of the Government of Australia, whereby they granted in terms a licence for the use of the said process at a royalty fixed at 9*d.* per 100 superficial feet for timber treated within the State and 2*s.* per 100 superficial feet for timber treated outside. The period during which the agreement was to remain in force was the continuance of the patent and thereafter until July 15, 1923, with a further provision in case the patent term was extended. On February 9, 1918, the term of the patent expired, and on February 11, 1918, a notice was given on behalf of the Crown, following up one already delivered on December 21, 1917, terminating the contract. The question that is in dispute upon this appeal is whether or no power was reserved to the Crown so to end the bargain. Burnside J. thought they were not so entitled, but his judgment was overridden by the unanimous opinion of the High Court of Australia, from whose judgment this appeal, by special leave, proceeds.

The question involved depends upon the effect of the Commonwealth Patents Act, 1903–1909, on a patent granted

before the Commonwealth Patents Act came into operation in one of the Colonies that ultimately became one of the States of the Commonwealth. By s. 87B, sub-s. 2, of the Commonwealth Act, it is provided: "Any contract relating to the lease of or licence to use or work any patented article or patented process, whether made before or after the commencement of this section, may at any time after the patent or all the patents by which the article or process was protected at the time of the making of the contract has or have ceased to be in force, and notwithstanding anything in the same or in any other contract to the contrary, be determined by either party on giving three months' notice in writing to the other party."

No such provision is found in the Western Australia statute under which the appellants' patent was issued, and their contention is first that the position they occupied remains wholly unimpaired except so far as the Commonwealth statute in express terms or by necessary implications effects a change, and secondly that the provision of s. 87B, sub-s. 2, did not affect their arrangements with the Government since the agreement they made with them was not a contract relating to the licence to use or work the patented process, inasmuch as the Crown could use as of right, and the licence as a licence was consequently nugatory.

It will be convenient to take this latter contention first into consideration. The point does not appear to have been raised in either of the Courts below, but as it relates to the proper construction of a statute, their Lordships have not thought fit to exclude it from the appellants' argument. In order that the position may be properly understood, it is necessary to consider s. 92 of the Commonwealth Patents Act. It is in these terms: "(1.) A patent shall to all intents have the like effect against the King as it has against a subject. (2.) But a responsible Minister of the Crown administering any department of the Public Service, whether of the Commonwealth or a State, may use the invention for the Public Service on such terms as are agreed upon with the patentee or in default of agreement on such terms as are settled by arbitration in the manner prescribed." This section has its equivalent in

J. C. 1921

WESTRALIAN POWELL WOOD PROCESS, LD. v. THE CROWN.

substance though not in terms in s. 32 of the Patent Act, 1888, of Western Australia. The result of both these sections is that liberty is reserved to the Crown to use a patented process, and if such liberty is exercised, in the absence of agreement, the terms of user are settled, if the Western Australia statute applies, by the Court after hearing all parties, but if the Commonwealth statutes operate, by arbitration as prescribed. It is urged that the right to use, so established, prevents the possibility of a licence being granted, since the essence of a licence is to confer the right of doing that which, without the licence, would not be permitted. It does not seem to their Lordships that this argument is conclusive of the matter; although the Crown is at liberty to use the invention it is only at liberty to use on conditions which in the absence of an agreement involve the settlement of the terms in the manner which the statutes provide. There is nothing to compel them to exercise this right, and the Crown is at liberty, if it thinks fit, to accept the ordinary grant of licence containing terms which may differ from those which might have been settled either by arbitration or the Court. It is true that this may only amount in the end to an agreement of the terms between the parties, but that is not necessarily the case, since if in effect an arrangement by way of licence does confer upon the Crown rights of termination not otherwise enjoyed, the Crown are at liberty to contract that the use of the patent shall take the form of a licence. There can be no doubt that the present grant, which was under seal, is in every detail and particular, as well as in language, the ordinary form of a licence to work a patent. It contains a recital of a proposal for a full licence and authority and the grant follows the words of the recital. In other words the parties have in fact contracted that the relationship between themselves shall be that of licensor and licensee, and though it might have been possible that the same result could have been reached by other means, this does not prevent the arrangement being what in name it purports to be, and consequently within the provisions of s. 87B, sub-s. 2. Apart altogether from this conclusion, their Lordships think the statute applies for this reason, that

there is no limitation suggested as to the meaning of the word licence, and it may as readily embrace a licence to use by statute, such as the Crown undoubtedly enjoys, as a licence by grant.

If therefore the words "patented article," "patented process" and "the patent" used in the section apply to a patent granted before the operation of the Commonwealth statutes by one of the colonies that became component States of the Commonwealth, the appellants must fail, and this leads to the second branch of the appellants' case, which is the real point that was considered in the High Court of Australia. It depends upon their being able to contend successfully, first, that the definition of patent in the Commonwealth statute is not applicable, and secondly, that even if it were, s. 6 of the statute preserves the rights extending under the State Patent Act, and that one of those rights was to secure payment by way of royalty for the use of the patented invention beyond the term of the patent without liability to determination. The definition section (s. 4) contains these terms: "'Patent' means letters patent for an invention granted in the Commonwealth. 'Patented article' means an article in respect of which a patent has been granted." As each State is a part of the Commonwealth, letters patent granted under any statute in one of the colonies are strictly included, but it is argued that "in the Commonwealth" means by or for the Commonwealth, and that the Commonwealth is rather a political description than a geographical area. The real answer to this is that the word "Commonwealth" can and may have both meanings, and that in this statute both such meanings occur. Sects. 41 and 46 and 56 (*c*) support the appellants' view, as each of these sections contains a contrast between an invention patented in the Commonwealth or in any State. But that merely shows that, it may be, in certain sections there is a contrast between the Commonwealth and the State. On the other hand, in s. 87A, and in other sections the phrase "in the Commonwealth" is clearly used in a geographical sense, and the question is in each section what the true meaning may be; it is a pure question of construction

J. C. 1921

WESTRALIAN POWELL WOOD PROCESS, LD. v. THE CROWN.

and it is sufficient for their Lordships to say that they agree with the High Court in the view they have expressed as to the meaning in this section.

There remains the construction of s. 6. This is in the following terms: "This Act shall not affect any proceedings pending under any State Patent Act nor any right or liability acquired or incurred before the commencement of this Act, and any pending proceedings may, subject to the provisions relating to the transfer of Patent administration from the States to the Commonwealth, be continued and completed as if this Act had not been passed."

The appellants' argument here depends upon assuming that the power possessed by virtue of the colonial statute was a right acquired by the patentee before the commencement of the statute. This is not in their Lordships' view the true meaning of the section. A right acquired does not mean a potential privilege enabling a contract to be made, but an actual right which was then enjoyed. If the contract in question had been made before the Commonwealth statute came into force, the privilege of s. 6 would have been conferred, but the power to make such a contract is a different thing from the right which the contract confers, and it is the latter and not the former which in this connection this section safeguards. The other construction involves the conclusion that the section means no more than that no patents already granted should be affected except by express language, and there is no reason why, had this been desired, it should not have been made plain.

Their Lordships regard it as unnecessary to discuss this question in greater detail, for there is nothing that they can usefully add to the clear and concise reasoning in which Isaacs J. clothed the judgment of the High Court.

For these reasons their Lordships think that this appeal must fail and should be dismissed with costs, and will humbly advise His Majesty accordingly.

Solicitors for appellants: *Trinder, Capron & Co.*
Solicitor for respondent: *M. L. Moss.*

[HOUSE OF LORDS.]

H. L. (E.)*
1921
May 5.

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

ARD COASTERS, LIMITED . . . . RESPONDENTS.

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED . . . . . APPELLANTS;

AND

MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA. . . RESPONDENTS.

Shipping — Collision — Ship Requisitioned by Admiralty — Charterparty —Destroyer patrolling the Seas—Absence of Navigation Lights—Loss of Ship—"Consequences of hostilities or warlike operations"—Liability of Admiralty.

A steamship was requisitioned by the Admiralty on the terms of a charterparty which provided that the Admiralty should not be liable for the loss of the ship by any sea risk, but should take the risk of "all consequences of hostilities or warlike operations." On the night of February 18, 1918, the steamship was lost by a collision with a British destroyer, which was patrolling an area of the North Sea for submarines. The vessels were proceeding on opposite and parallel courses. The destroyer, having come to the end of her beat, was turning on a starboard helm with a view to proceeding in the reverse direction and, in so doing, struck and sank the steamship. The night was dark and both vessels were sailing without lights. Neither vessel was to blame for the collision:—

Held, that the collision was the direct consequence of the warlike operation of patrolling the seas, and that the Admiralty were liable for the loss.

Decision of the Court of Appeal affirmed.

Insurance (Marine)—War Risk—War Ship on Voyage to pick up Convoy —Collision with Merchant Vessel—Absence of Navigation Lights— "Consequences of hostilities or warlike operations."

A merchant ship was insured by one set of underwriters against sea risks and by another set against war risks, including "all consequences of hostilities or warlike operations." On the night of July 23, 1917, she was sailing in convoy from the United States to England, and at

* *Present:* VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

H. L. (E.)
1921
ATTORNEY-GENERAL v. ARD COASTERS, LD.
LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD., v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA.

the same time a British war ship was proceeding on a voyage to pick up another convoy. The war ship ran into the merchant ship and damaged her. The night was dark and both vessels were sailing without lights. Neither ship was to blame for the collision:—

Held, that at the time of the collision the war ship was engaged in a warlike operation and that the collision was directly caused by that operation; that consequently the war risks underwriters were liable for the damage.

Decision of the Court of Appeal [1920] 3 K. B. 65 affirmed.

IN the first case the Crown appealed against an order of the Court of Appeal affirming a judgment of Bailhache J. in favour of the respondents' claim by petition of right to compensation for the loss of their steamship *Ardgantock*. The litigation arose out of a collision which occurred on the night of February 18, 1918, between the *Ardgantock* and His Majesty's destroyer *Tartar*. The *Ardgantock* had been requisitioned by the Admiralty on the terms of a charterparty known as T. 99, and the question to be determined was whether the collision was a consequence of a warlike operation within the meaning of clause 19 of that charterparty. The facts and the material clauses of the charterparty are fully set out in the judgment of Viscount Finlay, and are sufficiently summarised in the headnote for the purposes of the argument.

The second appeal arose out of a collision between a merchant ship, the *Richard de Larrinaga*, and His Majesty's warship *Devonshire*, and raised the same question in a different form.

The *Richard de Larrinaga* was insured by the appellants under a policy which covered "all consequences of hostilities or warlike operations by or against the King's enemies." She was also insured by the respondents under policies covering marine perils (including collision) and containing the usual f.c. and s. clause.

In this case the question at issue was whether the liability for the damage sustained by the *Richard de Larrinaga* as the result of the collision fell upon the war risks underwriters or upon the marine underwriters. This question was referred to an arbitrator, who made his award in the form of a special case.

Subject to the opinion of the Court, the arbitrator awarded that the collision was a consequence of hostilities or warlike operations, and that the war risk underwriters were liable. Bailhache J. affirmed this award (1) and his decision was affirmed by the Court of Appeal (Bankes Scrutton and Atkin L.JJ.). (2)

The facts are fully stated in the report of the case before the Court of Appeal and also in the judgment of Viscount Finlay.

THE ARDGANTOCK CASE.

1921. May 3. *Sir Ernest Pollock S.-G.* and *Raeburn K.C.* (*Sir Gordon Hewart A.-G.* and *R. H. Balloch* with them) for the appellant. Although patrolling for submarines was a warlike operation the *Tartar* could equally well have turned on a different helm and but for the absence of lights would have chosen a safe course. It was not necessary for her to turn across the course of the *Ardgantock*. The precise time, place and manner of her turning were matters within her discretion and formed no essential parts of the warlike operation. The real cause of the collision, which was an incident in the course of a warlike operation, was the absence of lights and not the warlike operation. Collision is prima facie a sea risk and the burden of rebutting that presumption is on the respondents. That burden they have failed to discharge. The Court of Appeal, in arriving at their decision, were too much affected by their previous decision in the *St. Oswald's Case* (*British and Foreign Steamship Co.* v. *The King* (3)), which proceeded upon the admission of the then Attorney-General that sailing without lights was a warlike operation; but the contrary is now established by this House in the *Petersham Case* (*Britain Steamship Co.* v. *The King*). (4)

[They also referred to *Ionides* v. *Universal Marine Insurance Co.* (5) and *Leyland Shipping Co.* v. *Norwich Union*

(1) [1920] 1 K. B. 700.
(2) [1920] 3 K. B. 65.
(3) [1917] 2 K. B. 769; [1918] 2 K. B. 879.
(4) [1921] 1 A. C. 99.
(5) (1863) 14 C. B. (N. S.) 259, 289.

H. L. (E.) 1921

ATTORNEY-GENERAL v. ARD COASTERS, LD.

Fire Insurance Society (1), as to the meaning of "consequences of hostilities."]

Leslie Scott K.C., *A. T. Miller K.C.* and *Le Quesne* for the respondents were not called on.

The House took time for consideration.

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD, v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA.

THE RICHARD DE LARRINAGA CASE.

1921. May 3, 5. *Raeburn K.C.* and *S. L. Porter* for the appellants.

1. On the facts as found the *Devonshire* was not engaged in any warlike operation at the time of the collision. She was proceeding on a peaceful operation with a view to subsequently taking up a warlike operation. If the passage of a warship from one place to another with a view to picking up a convoy is a warlike operation that amounts to saying that any movement of a warship in time of war is a warlike operation. That is too broad a statement. It was quite possible that the convoying operation which the *Devonshire* was about to undertake might not have been undertaken for two or three months.

2. Assuming that this was a warlike operation, it was not that operation but the sailing without lights that was the proximate cause of the collision. The *St. Oswald's Case* (*British and Foreign Steamship Co.* v. *The King*) (2) is distinguishable, first, because both ships were there engaged in warlike operations, and, secondly, by reason of the admission of counsel as to navigating without lights—an admission upon which Scrutton L.J. founded his judgment. It is an unsatisfactory case. Atkin L.J. in his judgment in the *Petersham Case* in the Court of Appeal (*Britain Steamship Co.* v. *The King* (3)) deals with both the questions raised by the appellants in this case. Upon the first question he says: "I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties while exercised in the area of war could be included." The qualifying words of

(1) [1918] A. C. 350. (2) [1917] 2 K. B. 769; [1918] 2 K. B. 879.
(3) [1919] 2 K. B. 670, 692, 695.

that sentence are important. In the *Matiana Case*, which was heard with the *Petersham Case* in the House of Lords (*British India Steam Navigation* v. *Liverpool and London War Risks Insurance Association* (1), Lord Sumner says that not everything done by a King's ship in time of war is necessarily a warlike operation, and he discusses the meaning of the phrase "consequences of warlike operations."

[They also referred to *Dominion Coal Co.* v. *Maskinonge Steamship Co.* (2) on the question whether the place where the collision occurred was within the area of war.]

R. A. Wright K.C., *A. T. Miller K.C.* and *Le Quesne* for the respondents were not called on.

At the conclusion of the arguments on behalf of the appellants in the second case their Lordships proceeded to give judgment in both cases.

VISCOUNT FINLAY. My Lords, I shall deal with these two cases separately, and I take first the *Ard Coasters Case*, which we heard argued on the previous occasion.

In that case there was a petition of right against the Crown based on the obligations undertaken by the Admiralty under the form of a charterparty, which is very familiar now, known as T. 99. The facts out of which the question arises are very simple. His Majesty's warship *Tartar* was engaged in patrolling in the district between the Tees and Whitby. For the purpose of patrolling, looking out for submarines or anything in the shape of an enemy, the *Tartar* ranged about the seas, proceeded for a certain distance and then turned and proceeded in the opposite direction, and so on, over all the bit of sea which she was directed to patrol. She had been proceeding at the time, just before the turning which led to the collision taking place, in a southerly direction. The *Ardgantock* was a merchantman which was proceeding in the same part of the sea in a northerly direction on a course such that, if the lines of both courses had been prolonged, they would have been parallel, and, had no alteration by

(1) [1921] 1 A. C. 99, 129, 131.
(2) (1918) 34 Times L. R. 212; [1918] W. N. 23.

H. L. (E.) 1921

ATTORNEY-GENERAL v. ARD COASTERS, LD.

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD., v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA.

Viscount Finlay.

turning on the part of the *Tartar* taken place, the two vessels would have passed one another safely port to port. Both vessels were navigating with the lights out; it was a dark night, and the *Tartar* when she got to the point whereabouts in the ordinary course she would turn round and go in the opposite direction proceeded to starboard, and when she did that she was within such a short distance of the *Ardgantock* that there was not time to prevent the collision which ensued. She had not been able to see the *Ardgantock*, the night being dark, the visibility not good, and the lights being out, and the result was that the *Tartar* struck the *Ardgantock* on the port side at about right angles.

Now, my Lords, under these circumstances the question arises as to the effect of clauses 18 and 19 in the charter-party T. 99 under which the Admiralty had requisitioned the ship. The 18th clause deals with sea risks, and it is this: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk"—the Admiralty for that is not to be liable. Then comes clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war." The rest of clause 19 I need not read.

It was argued by the Solicitor-General that this could not be regarded as the consequence of a warlike operation, because there was no necessity for the *Tartar* to turn under her starboard helm; she might have turned the other way. Of course she might, but she must turn some way, and, turning either way, whichever way she takes to turn, it is part of the operation of her patrolling, and owing to the fact

that the *Ardgantock* was not visible the collision took place. It appears to me that the loss was a direct consequence of the patrolling, and the turning which took place was part of that operation.

Bailhache J. at p. 67 of the Appendix is reported as saying this: "The negligence point therefore fails"—he had been dealing with that part of the case which I need not trouble about—"and it remains to consider whether this collision was a consequence of hostilities or of warlike operations. Now I have said what the *Tartar* was doing. She was a destroyer, and she was patrolling the seas in search of submarines. In doing that she was patrolling the seas at night without lights. The *Ardgantock*, in pursuance of the Admiralty instructions, was also sailing without lights. I have already held in an earlier case, that under those circumstances, where there is a collision between two merchant vessels, neither of which is engaged in a warlike operation, the mere fact of their both sailing without lights in pursuance of Admiralty directions to that effect and colliding, does not make the collision a war risk, but it retains its character of a marine risk. But in this case there was a warlike operation. The *Tartar* was patrolling the seas. That of itself was a warlike operation. She was patrolling the seas without lights, which made the warlike operation dangerous. The collision was due to the fact that the *Tartar* was patrolling the seas, that is to say, it was due to a warlike operation which was being conducted on the part of the Admiralty. It seems to me therefore to follow that the collision which was due to that is a consequence of hostilities or warlike operations."

In the Court of Appeal Atkin L.J. puts the matter very clearly indeed. I may be permitted just to quote one passage from this one judgment in the Court of Appeal (at p. 78): "To my mind the *Tartar* was clearly engaged upon a warlike operation. She was patrolling the seas in search of submarines, and, indeed, for the purposes of this argument counsel for the Crown accepted the findings of the learned judge, and accepted and argued the case on the assumption

H. L. (E.) 1921 — ATTORNEY-GENERAL v. ARD COASTERS, LD. — LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD., v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA. — Viscount Finlay.

that the *Tartar* was engaged in a warlike operation. Now it appears to me that as part of her warlike operation it was her duty to alter her course from time to time under circumstances where she could not effectively see where she was going; in other words she had to turn in the dark. Turning in the dark she ran into the suppliants' vessel, the *Ardgantock*, and that vessel was, without negligence on her part, navigating without lights in such a position that the *Tartar*, executing her warlike operations, without negligence, must run into her. The injury to the *Ardgantock* was proximately caused by the impact of the war vessel moving in the course of its warlike operations. It seems to me unnecessary to consider whether the *Ardgantock* was sailing without lights by reason of her being engaged in a warlike operation or by reason of her being engaged in a peaceful operation. The injury was directly due to the warlike operation of the *Tartar*, just as it would have been in my view if the *Tartar* had been herself injured by running into an unlighted wreck or other peril of the same kind. The *Tartar* would have avoided the peril if she had received timely warning by lights, or otherwise, of the presence of the *Ardgantock*, but that she had in the course of her warlike operations to proceed without such warning and to expose herself and others to risk of injury is one of the risks of the warlike operation. In my view the injury of the *Ardgantock* was proximately caused by the warlike operation of the *Tartar*."

My Lords, I entirely agree with that view of the case, and I desire only to say one word about the case of the *St. Oswald* (1) and the admission which was supposed to have been made on behalf of the Crown in that case, that the absence of lights made the adventure a warlike operation. I think there must have been some misunderstanding there, and that any admission which was made must be read with reference to the particular circumstances of the case. It cannot be that the mere fact that two merchantmen at sea proceeding on their peaceful errand as merchantmen become

(1) [1917] 2 K. B. 769; [1918] 2 K. B. 879.

engaged in a military operation, because for the purpose of escaping submarines or the enemy they are sailing with their lights out. They are sailing with their lights out on a peaceful errand and in the hope of evading the attention of enemy warships.

For these reasons, my Lords, it seems to me that in this case the decision of the Court below was right and the appeal should be dismissed.

The second case is the *Liverpool and London War Risks Insurance Association, Ld.* v. *Marine Underwriters of the Steamship Richard de Larrinaga.* In this the question arises in a contest between the two sets of insurers, the marine underwriters, who insure against sea risks, and the War Risks Association, who insure against war risks. We have been supplied with a copy of the policies issued by both these bodies. Taking the War Risks Association's policy the second clause is this: "This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies, and the consequences thereof or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war." Now, my Lords, the War Risks Association say that this case does not fall within the terms of that clause. The facts giving rise to the question are extremely simple. The *Richard de Larrinaga* was going in an easterly direction in convoy not very far from the coast of the United States on the Atlantic side. His Majesty's ship *Devonshire* was proceeding from Halifax in Nova Scotia to Hampton Roads in Virginia for the purpose of picking up a convoy there, and the *Richard de Larrinaga* was run into by the *Devonshire*; there was a collision between the two vessels, and the damage took place which is the subject of the arbitration, which has finally, on a case stated by the arbitrator, come before your Lordships. The award was stated in the form of a special case. The first paragraph states that the claim in the arbitration arose out of a collision between the steamship *Richard de Larrinaga* and His Majesty's ship *Devonshire* in the Atlantic on July 23, 1917. The second

H. L. (E.) 1921 — ATTORNEY-GENERAL v. ARD COASTERS, LD. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD, v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA — Viscount Finlay. —

paragraph states: "At the time in question the *Richard de Larrinaga* was sailing in convoy at a speed of about six to seven knots an hour. In obedience to Admiralty orders she was exhibiting no lights. The night was very dark. The *Devonshire* was on a voyage to pick up a convoy of merchant vessels, she was making a speed of about 12 knots an hour and was exhibiting no lights. The two ships sighted one another at close quarters and very shortly afterwards the collision occurred. A good look-out was being kept on each." Then the next paragraph in the case states that the question had been referred to Mr. Butler Aspinall, and the fourth paragraph states that by an interim award he had found that it was not established that either of the ships was to blame for the collision. The fifth paragraph states that the Marine Underwriters and the War Risks Association came before him afterwards for the determination of the question, whether the collision arose from a marine or from a war peril, and the sixth paragraph quotes the clause, which I have already read, from the policy itself.

Bailhache J. in dealing with this matter says (1): "I do not think that very much assistance is to be obtained from *British and Foreign Steamship Co.* v. *The King* (the *St. Oswald's Case*) (2), which proceeded, as the Court of Appeal pointed out in the *Matiana Case* (3), upon admissions made by the Crown, admissions which seem to have made the result inevitable"—as I have said in the *Ard Coasters Case*, I think there is some misconception about that. "Leaving that case out of account, I think that, upon the authorities, the following propositions are established—namely, that where one of His Majesty's ships is sailing at night without lights and is engaged in hostile duties such as looking for submarines, and collides with another ship, the collision is a consequence of hostilities. The result is the same if one of His Majesty's ships is engaged in convoying other ships, and they are sailing without lights at night and a collision occurs. That collision is a consequence of hostilities or

(1) [1920] 1 K. B. 705.
(2) [1917] 2 K. B. 769; [1918] 2 K. B. 879.
(3) [1919] 2 K. B. 670.

warlike operations. The question which remains, and which is not absolutely covered by authority, is what is the position in such a case as the present one where one of His Majesty's ships is sailing at night without lights, but is not at the moment actively engaged in definite warlike operations—such as patrolling and being on the lookout for submarines, or actually convoying ships—but is proceeding to her station for the purpose of taking up her duties there as a convoying ship. Atkin L.J. in the *Petersham Case* (1) said: 'I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties, while exercised in the area of war, could be included.'" Bailhache J. goes on: "I think that when one of His Majesty's ships is proceeding to her station to take up her duties as a convoying ship she is engaged on a warlike operation."

In the Court of Appeal Bankes L.J. expressed an opinion to the same effect (2): "I cannot distinguish the facts of this case from those in *Ard Coasters* v. *The King*. (3) . . . . Counsel for the appellants said that the *Devonshire* was at the material time proceeding on a peaceful voyage with a view later on to engage in a warlike operation. I do not agree with that contention. I think that the warship while proceeding to her station in order to pick up a convoy was at the time she was so proceeding engaged in a warlike operation."

I entirely agree with the opinion expressed by both these learned judges. Part of a warlike operation consists in getting to the proper point for striking at the enemy if actual hostilities of that kind are the object of the expedition, or in proceeding to the point where the duty of undertaking the charge of a convoy is to take effect. Protecting convoys is a form of warlike operation, it is an operation in the course of war necessary to be performed by war vessels for the purpose of protecting the merchantmen. I cannot separate the proceeding under orders to the spot where the duty is to

(1) [1919] 2 K. B. 670, 695. (2) [1920] 3 K. B. 65, 70.
(3) (1920) 36 Times L. R. 555.

H. L. (E.) 1921

ATTORNEY-GENERAL v. ARD COASTERS, LD.

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD., v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA.

Viscount Finlay.

be discharged from the actual discharge of the duty itself; both form part of the warlike operation. It is just as much a part of a warlike operation to get your ships or your troops to the spot where a thing is to be done as it is to do it when you get to the spot.

It is said "Oh, there may be great difficulties in saying when the progress to the place of operation begins." Well, nice questions might arise in some cases, but it seems to me perfectly plain that when a war vessel is actually at sea, and is there because she is under orders to go to a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in that warlike operation, because she is doing that which is necessary to get to the spot where the actual thing is to be done.

For these reasons, my Lords, it appears to me that the decisions of the Courts below were right and ought to be affirmed.

LORD DUNEDIN. My Lords, I concur. In the *Ard Coasters Case* I think the judgment may be put in a form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The *Tartar* was engaged in such patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation.

In the other case I think it is necessary first to see exactly what has been already decided by this House in the *Matiana Case*. (1) I think the *Matiana Case* was a clear decision to the effect that the escorting ship of a convoy is engaged in a warlike operation—the escorted ship is not. Here, if the *Devonshire* had been the escorting ship, then the result, in view of the *Matiana Case* and the last case, would be clear; the collision would be a consequence of a warlike operation. The *Devonshire* was not actually the escorting ship, and she was not actually convoying, but she was on a voyage to pick up a convoy; her commission to convoy covered her proceeding to the place where she was to pick up the

(1) [1921] 1 A. C. 99.

convoy, and accordingly I think it comes within the decision in the *Matiana Case* that she was engaged in warlike operations.

LORD SUMNER. My Lords, I agree. I think both the *Ardgantock* and the *Richard de Larrinaga* were lost in and by warlike operations and as a direct consequence of them. The *Tartar* was on patrol, and so all her manœuvres in the course of that duty were her warlike operations. One of the manœuvres was to "starboard ten" just before this collision, and she was irrevocably committed to it before she could see the *Ardgantock*. In continuing it she found the *Ardgantock* across her course before anything could be done, and as part of the continuance of that warlike operation the *Ardgantock* was cut down. The absence of lights was only one of the conditions, not the direct cause of what happened. This case is distinguishable from those of the *Petersham* and the *Matiana*. (1)

The case of the *Richard de Larrinaga* is another illustration of the same position. His Majesty's ship *Devonshire* was proceeding on her duty of going to pick up a convoy through waters where convoying and navigation without lights were both necessary. There was a possible risk of the sudden appearance of enemy craft, and in that area of war the *Devonshire* would be bound, if occasion arose, to take appropriate warlike action. We do not know the details but I think we must take it that she ran into the *Richard de Larrinaga*, because she was steaming on the particular course which she actually took as part of that warlike operation, and therefore the collision was directly caused by that part of her warlike operation. It cannot at any rate be said that this cruise of the *Devonshire* was not a warlike operation. There may be action taken and effects produced by men-of-war in time of war which are not warlike operations, and no doubt operations in war and operations of war are not necessarily the same thing; but no exact definition of these terms is needed for this case, and I

(1) [1921] 1 A. C. 99.

H. L. (E.) 1921

ATTORNEY-GENERAL v. ARD COASTERS, LD.

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD., v. MARINE UNDER-WRITERS OF S.S. RICHARD DE LARRINAGA.

think the task of framing one had better be left to those of your Lordships who may be sitting here in the next war.

LORD PARMOOR. My Lords, I agree, and I desire to add nothing in the *Ard Coasters Case.*

In the case of the *Richard de Larrinaga*, although concurring in the opinions already delivered, I desire to add a few words.

The cases referred to show that a warship may be engaged in a warlike operation though no attack upon or by the enemy is taking place or immediately impending. In this case a commissioned ship of war was at the time of the collision under orders to pick up a convoy of merchant ships and was on her way at sea to carry out these orders, in accordance with her duty. Under these conditions she appears to me to be a ship engaged in a warlike operation. I should be prepared to indorse the view of Bailhache J. founded on an opinion expressed by Atkin L.J. in these words (1): "Indeed, I think, agreeing with respect with the view expressed by Atkin L.J. in the passage to which I have referred, that almost any movement in war time at sea of one of His Majesty's ships is a warlike operation." It is not necessary to say that some exceptional conditions might not arise, but no such conditions are present in this case.

The rest of the case appears to me to be covered by your Lordships' decision in the *Ard Coasters Case.*

LORD WRENBURY. My Lords, there are two cases before the House. The principles applicable to each have, I think, been largely determined, or at any rate indicated, in the opinions expressed by your Lordships in the *Britain Steamship Co.* v. *The King.* (2) I take it that this is certainly decided—that an ordinary marine risk does not become a war risk because some regulation operative during and by reason of war renders the risk more serious. The question

(1) [1920] 1 K. B. 700, 706. (2) [1921] 1 A. C. 99.

is whether the loss was occasioned by a new risk arising by reason of warlike operations.

The first case with which your Lordships have to deal is this: The *Tartar* was engaged on a warlike operation. She was performing the duty of patrolling a certain area of the sea going from north to south, then turning and going from south to north, and so on, from time to time. She was doing this in discharge of her duty as a vessel of war in order to deal with the possibility that there were submarines in the district with whom it would have been her duty to engage if she had found them. While engaged on that duty, having finished her beat in one direction, she was turning for the purpose of proceeding in the reverse direction. The operation of turning was a necessary part of the warlike operation of patrolling that part of the sea. There were no lights, the night was dark, and in turning she fouled the course of the *Ardgantock*, which was proceeding along the coast, and a collision occurred.

It is plain, I think, that the course of the *Tartar*, whether she was proceeding directly down the coast, or whether she was turning for the purpose of going in the reverse direction, was equally a course taken in discharge of her duty as a ship conducting a warlike operation. If the two ships had met end on, and without anything to attach blame to either vessel a collision occurred, there can be no question I think about it. If a warship engaged in performing a particular duty of war, in the course of performing that duty, without blame attaching to either vessel, comes into collision with another vessel in ignorance of her proximity, because for precautionary reasons neither ship is carrying lights, the collision results in consequence of her operation of patrolling, and the loss is a loss in consequence of warlike operations. There can be no difference by reason of the fact that the ships did not meet end on, but that the *Tartar* in discharge of her duty was turning at the moment when the collision occurred. The Solicitor-General's argument, I think, if I seek to summarise it, really came to this, that no doubt the *Tartar* was engaged in a warlike operation, but that

H. L. (E.) 1921

ATTORNEY-GENERAL v. ARD COASTERS, LD.

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LD., v. MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA.

Lord Wrenbury.

the moment when she should turn, the direction in which she should turn and the place where she should turn, were matters in her discretion; that she was not compelled by her duty as a ship of war to turn when she did or where she did or as she did. My Lords, that is an argument which does not commend itself to me. It was her duty to turn somewhere, and, if in the ordinary course of her turning the result was a loss, it appears to me that that was in consequence of her warlike operation. For these reasons it seems to me that the first appeal fails.

I have then to apply myself to the second appeal upon the footing that the first case has decided that, if a warship on a war errand—that is to say, in discharge of a duty of war—causes a collision which results from her warlike operation that is a war risk. The real point to my mind in the second case is whether the ship in question was engaged on a war errand, so that she was engaged in a warlike operation at the moment when the collision occurred. I can quite understand that there are many cases in which there might be great difficulty in answering the question whether at a particular moment a ship of war is engaged in a warlike operation. I do not think it is enough to say that the ship was a warship and was proceeding under orders given by naval authority. If, for instance, her orders were to go into dock to have her bottom cleaned or her boilers overhauled, and she was simply proceeding there, that might be one case. If, on the other hand, her orders were to go as fast as she could to a particular place to take part in an action which was proceeding or immediately expected, that is another case, and I should say that certainly she was on a war errand and engaged in a warlike operation. I do not think the matter is to be tried by the fact whether she is firing her guns or using her ram at the moment or anything of that kind. The question is what is the duty she is performing at the moment. The particular facts we have here to deal with are these. The vessel in question was under orders to go to a particular place to pick up a convoy of merchantmen. When she was convoying them certainly she would have been engaged in

a warlike operation. I think that operation began when she took up the duty of going to the place where she was to do that act. She was, I think, engaged in a warlike operation at the time the collision occurred.

For these reasons I think the second appeal fails.

ATTORNEY-GENERAL *v.* ARD COASTERS, LIMITED.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 5, 1921.

Solicitor for the appellant: *The Treasury Solicitor.*
Solicitors for the respondents: *Charles Lightbound & Co.*

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED *v.* MARINE UNDERWRITERS OF S.S. RICHARD DE LARRINAGA.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 5, 1921.

Solicitors for the appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*
Solicitors for the respondents: *Charles Lightbound & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 June 2

FITCH . . . . . APPELLANT;

AND

DEWES . . . . . RESPONDENT.

Restraint of Trade—Solicitor and Managing Clerk—Contract of Service—Restrictive Covenant—Restriction limited in Space, unlimited in Time—Reasonableness.

By an agreement dated August 17, 1912, made between the plaintiff, a solicitor practising at Tamworth, and the defendant, who was employed by the plaintiff from 1899 to 1914 successively as junior clerk, articled clerk, and managing clerk, the defendant undertook to serve the plaintiff as managing clerk for three years, and expressly agreed with the plaintiff that he would not, on the expiration or sooner determination of that term, either alone, or jointly with any other person or persons, directly or indirectly, "be engaged or manage or concerned in the office, profession, or business of a solicitor, within a radius of seven miles of the Town Hall of Tamworth," except in respect to a particular business therein mentioned. After the termination of the defendant's employment under the agreement the defendant in 1919 intentionally committed a breach of the restrictive covenant in order to test the validity of the restriction:—

Held, that the covenant, though unlimited in point of time, did not in the circumstances exceed what was reasonably required for the protection of the covenantee and was not against the public interest.

Decision of the Court of Appeal [1920] 2 Ch. 159 affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Eve J. (1)

The action was brought by the respondent, a solicitor practising at Tamworth, against the appellant, another solicitor, for an injunction to restrain the appellant from practising as a solicitor in breach of an agreement of service dated August 17, 1912, and made between the respondent and the appellant.

The breach was admitted and the sole question for determination was whether in the circumstances of the case the agreement was unenforceable by reason of its being in unreasonable restraint of trade.

By this agreement the appellant agreed to serve the

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT CAVE, LORD SUMNER, LORD PARMOOR, and LORD CARSON.

(1) [1920] 2 Ch. 159.

respondent as managing clerk during the term of three years from December 31, 1911, or for such longer period as might be agreed upon, at a salary of 2*l.* a week plus a half share of the gross profits of the business after deduction by the respondent of 300*l.* therefrom, and it was provided by clause 1 that the appellant should not without the consent of the respondent divulge any secrets or dealings in relation to the profession or business of the respondent and would not during the said term engage or be concerned in any similar profession or business without the written consent of the respondent. Clause 8 of the agreement was as follows: "The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that he will not on the expiration or sooner determination of the said term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office profession or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners Association at Tamworth or within the aforesaid radius thereof."

The facts are fully stated in the report of the case before Eve J. and the Court of Appeal and sufficiently appear from the judgment of the Lord Chancellor.

Clayton K.C. and *J. E. Harman* for the appellant. This covenant exceeds what is reasonably required for the protection of the respondent's business and is against the public interest. The special features of this case are, first, that this is a service agreement, and, secondly, that the restriction is unlimited in point of time. It is unnecessary to refer to the long list of cases or covenants in restraint of trade, because the law on this subject is now well settled and has been discussed in your Lordships' House in several recent cases. In *Morris* v. *Saxelby* (1) a sharp distinction is drawn between a covenant exacted by a purchaser from the vendor on a

(1) [1916] 1 A. C. 688, 709.

H. L. (E.) 1921 FITCH v. DEWES.

sale of the goodwill of a business and a covenant exacted by an employer against his employee. Lord Parker, after stating that in the former case a covenant against competition is reasonable, if confined to the area within which it would in all probability enure to the injury of the purchaser, said that it was different in the case of an employer taking a covenant from his employee, and that he could not find any case in which a covenant against competition by a servant or apprentice had, as such, ever been upheld by the Court. Those observations apply to the present case. This covenant is aimed at competition and is not required for the protection of the respondent's business. As Lord Parker points out, different considerations arise where the covenant is designed to prevent the employee from divulging trade secrets or from making use of information confidentially acquired in his employment, but here those matters are specifically provided for by a separate clause of the agreement. In the same case Lord Atkinson expressed his opinion that an agreement which was oppressive in the sense that it would deprive the employee for a lengthened period from exercising his skill and experience to the best advantage was opposed to the public interest. (1) It is only in very special circumstances that a covenant unlimited in point of time will be upheld, and particularly in the case of a covenant in an agreement of service. In the circumstances of this case the covenantee would have been amply protected by a covenant for a limited period, say, ten years. *Eastes* v. *Russ* (2) is a direct authority in favour of the appellant on both points and governs this case. The appellant relies upon the observations of Younger L.J. in the Court below to the effect that the view of the Courts with regard to the validity of restrictive covenants, when imposed upon an employee, has recently undergone a change and that covenants which a few years ago would not have seemed open to questions are now treated as invalid.

Maugham K.C. and *Henry Johnston* for the respondent were not called on.

(1) [1916] 1 A. C. 698. (2) [1914] 1 Ch. 468.

H. L. (E.)
1921
FITCH
v.
DEWES.

LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order of the Court of Appeal dated May 4, 1920, which affirmed a judgment of Eve J. in favour of the respondent. The question which requires decision at your Lordship's hands is whether or not an agreement, to which I will more particularly refer in a moment, in restraint of practice entered into by a solicitor upon his engagement by another solicitor as his managing clerk is valid. The facts in the case are either admitted or have been the subject of concurrent findings in the Courts below, and so far as I think them material I will very shortly summarise them.

The respondent has been for more than twenty years a solicitor practising at Tamworth in the county of Warwick. In the year 1899 the appellant, who was then a youth of some fifteen years of age, entered into the employment of the respondent in the capacity of a junior clerk and he continued in that employment until the month of June, 1914. In May, 1903, when the appellant was about nineteen years of age, he was articled to the respondent, and the articles contained, in anticipation of the time when the former would be in a position to practise, a stipulation in restraint of such practice upon which I do not think it is necessary to dwell, inasmuch as further stipulations replaced it at a later date. On January 22, 1908, an agreement entered into between the respondent and the appellant provided that if the appellant was successful in his final examination he should serve the respondent as managing clerk, and that agreement also contained a stipulation in restraint of practice by the appellant with which equally and for the same reason I think it unnecessary to deal.

By an agreement dated August 17, 1912, the appellant undertook to serve the respondent as managing clerk for a term of three years from December 31, 1911, or for such longer period as was contingently contemplated in the instrument. It is not necessary that I should trouble your Lordships with the provisions in general of that agreement, but clause 8 which falls to be construed is in the following terms: "The said Thomas Birch Fitch hereby expressly

H. L. (E.) 1921 FITCH v. DEWES. Lord Birkenhead L.C.

agrees with the said John Hunt Dewes that he will not on the expiration or sooner determination of the same term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office profession or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners Association at Tamworth or within the aforesaid radius thereof."

My Lords, the appellant here impeaches the clause which I have just read on the ground that it is against public policy, as being in restraint of trade.

The controversy is the old one between freedom of contract and certain considerations of public policy, which have received much attention at the hands of the Courts in the last few years. It is sufficient for me to say at this point that the contract was entered into between two solicitors: that at its date the appellant had reached the age of twenty-seven years; that he had been for some thirteen years employed in a solicitor's office; and it is reasonable to infer from the promotion which he had received and from the evident appreciation which his employer had formed of his services, that he was a young man alert and very competent both to understand and to safeguard his own interests. The agreement then into which he entered, and in respect of which he has accepted for a lengthy period the consideration which was to move from the covenantee towards himself, will naturally stand unless he satisfies your Lordships that it is bad as being in restraint of trade.

What then is said by the appellant under that head? He does not complain of the restriction of space, and indeed it would have been very difficult for him to do so. The clause only restricts him from being directly or indirectly engaged in the office profession or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth. We need not therefore trouble ourselves with any question of

the restriction in respect of space but may confine ourselves to the complaint which is made that the agreement cannot stand, because the restriction in respect of time is unlimited and is against the public interest. But it is to be noticed here, as has been said in more than one of the earlier cases, that guidance may be derived in dealing with a restriction relating to time from an examination of the restriction which is made in respect of space. And the converse remark is of course equally true. For instance, if the restriction in respect of space is extremely limited, it is evident that a very considerable restriction in respect of time may be more acceptable than would otherwise have been the case.

The Courts have been generous in elucidating these matters by the enunciation of general principles in the course of the last few years, and I am extremely anxious not to carry this process further to-day; therefore I say plainly and, I hope, simply, that it has for long now been accepted that such an agreement as this, if it is impeached, is to be measured by reference to two considerations: first, is it against the public interest? and, second, does that which has been stipulated for exceed what is required for the protection of the covenantee? It might perhaps be more properly stated, as it has sometimes been with the highest authority stated, does it exceed what is necessary for the protection of both the parties? But the impeachment which is in fact made in this case demands the consideration of the earlier question only, does the restriction which is attacked exceed that which was reasonably necessary for the protection of the covenantee?

The answer to these questions is to be found in an examination of the circumstances, and Mr. Clayton was undoubtedly right when he said towards the close of his argument that in order to determine whether or not in a particular case such a restriction did exceed that which was so reasonable it became necessary to understand the facts of the particular case.

What then are the facts here? A boy of the age of fourteen is taken from a humble employment in the office of the local co-operative society and he is trained in the office of a solicitor of position in this particular neighbourhood.

H. L. (E.) 1921 FITCH v. DEWES. Lord Birkenhead L.C.

He is plainly competent to acquire information with facility; he is presented with his articles by his employer; one agreement succeeds to another until he finds himself in a position within the town both of influence and of importance. Under those circumstances, the agreement is entered into which contains the restriction which is now the subject-matter of litigation. What then is it in respect of which on such facts the covenantee is entitled to be protected? Because it is not until we reach a conclusion upon this point that we shall be in a position to decide whether or not this particular restriction does in fact exceed that which is so required. I conceive, my Lords, that the covenantee is entitled to this. He is the founder, or at least the possessor, of the business of an attorney. Such a business depends upon the existence of goodwill; upon the association and the intimacy which exist between him who carries on that business and the clients of the firm, an intimacy founded upon many complex considerations not easily to be defined, but very easily to be understood. Such a covenantee is taking into his employment in his firm a young man in circumstances which make it certain that the latter will acquire a close personal acquaintance with the clients from whom, and from whom alone, the business of the firm arises. How intimate were the opportunities given to the appellant in this case of acquiring a close acquaintance with the clients of the firm is made abundantly plain by figures presented in evidence and referred to by Mr. Clayton which distributed into percentages the number of interviews which took place in the office with the appellant and the respondent respectively. The table which has been produced shows that in the year 1910 the respondent had 942 interviews with clients and the appellant 322, the percentage of the appellant's interviews being 25; in 1911 the proportions were respondent 944, appellant 464—the appellant's percentage 33; in 1912 respondent 960, appellant 900—the appellant's percentage 48; in 1913 respondent 915, appellant 1014—the appellant's percentage 52; in 1914, in the period of six months in relation to which

we are told the appellant only attended three days a week, the respondent interviewed 519, the appellant 248—so that the appellant's percentage was 32. My Lords, it is therefore clear that if you take the period between 1910 and 1914 it is not a very great exaggeration to say that half the people who came to this office, perhaps not particularly caring whom they saw but merely asking to consult somebody who represented the business, were shown in to the appellant, so that, under the ægis of the firm, he either originally made or continued their business acquaintance. And this circumstance enables me to answer without the slightest ambiguity, so far as I myself am concerned, the question which I proposed a moment ago, What was it that in such a case the protection of the covenantee rendered reasonable? He might claim in my judgment, for his protection, that that business which was his, and to which he had admitted the appellant in the manner defined by the successive agreements, should continue to be his, and that if at any time the contract of employment between himself and his employé came to an end, on such determination the latter should not be in a position to use the intimacies and the knowledge which he had acquired in the course of his employment in order to create a practice of his own in that same place and by doing so undermine the business and the connection of the respondent. I have only to ask myself whether the restriction which is contained in clause 8 is excessive for that purpose; because I dismiss in this connection the contention which was not seriously argued by Mr. Clayton that there is anything in such a clause which is in conflict with the public interest. Indeed I am of opinion that it is in the public interest that a proper restrictive agreement of this kind between an established solicitor, possibly an elderly man, and a younger man should be allowed. It is in the public interest, because otherwise solicitors carrying on their business without a partner would be extremely chary of admitting competent young men to their offices and to the confidential knowledge to be derived by frequenting those offices. There is therefore nothing in the clause which I have read which conflicts

H. L. (E.) 1921 FITCH v. DEWES. Lord Birkenhead L.C.

with public interest unless, of course, it exceeds what is necessary for the protection of the covenantee, in which case the excess itself would be against the public interest.

My Lords, it is not contended that there is anything which is open to attack in clause 8 except that part of the clause which for all time excludes the appellant from carrying on practice within seven miles of Tamworth. Are we then to say that such a restriction so unlimited goes farther than is permitted in relation to the standard which I have restated? I am of opinion that it does not go too far. One of your Lordships asked Mr. Clayton in the course of his argument what period in his judgment would be a reasonable period, and Mr. Clayton replied that he thought that ten years might be a reasonable period. My Lords, why? Why is it to be said that ten years is a reasonable period? I can quite easily understand that at the end of a period of ten years the appellant in this case, who by this very clause is not prevented from maintaining and even developing his business acquaintance with the clients of the firm so long as he does not practise within a range of seven miles, might have retained all these circumstances of special, and as I think of illegitimate, advantage for the purpose of competing with the business of the respondent, and then might come forward and do that very thing against which in my judgment the covenantee is abundantly entitled to be protected. Therefore I should dismiss a period of ten years and I should even say of twenty or thirty years that it was quite impossible to be dogmatic upon the period proper to each individual case. Some men live very long lives, and it might easily be that in a case in which two men were both tenacious of life the very same danger which applies at this moment in this case would present itself, in a more striking and formidable shape, at the end of twenty years or at the end of an even longer period. I have no doubt that it is for this reason that the Courts long since determined that they would lay down no hard and fast rule either in relation to time or in relation to space, but that they would treat the question alike of time

and of space as one of the elements by the light of which they would measure the reasonableness of the restriction taken as a whole.

I am therefore, for the reasons I have stated, of opinion that the attack which has been made upon this restriction fails. I find that it is not opposed to the public interest and that it does not exceed what is reasonably required under the circumstances of this case for the protection of this covenantee.

It is to be observed that a similar question was discussed in *May* v. *O'Neill* (1) by the then Master of the Rolls, Sir George Jessel, in 1875. The restriction in that case was far more oppressive than the one under consideration in the present case. The defendant bound himself to a London solicitor by articles for a certain term and covenanted that he would not at the expiration of the term or any term thereafter directly or indirectly practise the business of an attorney or a solicitor within the City of London or the counties of Middlesex or Essex. My Lords, it may be, as Mr. Clayton said, that the outlook of the Courts upon these doctrines has somewhat developed of recent years, though I do not find that the form in which the rules have been defined has differed very much over a considerable period; but it is worth noticing that the then Master of the Rolls upheld a restriction as rigorous as that which I have indicated. He says: "I think this case quite within both limits. However numerous the plaintiff's clients may be, there must be plenty left for the defendant, if he can gain their confidence; and there is nothing against the public interest in a clerk's agreeing not to take away the clients from his master"; and so he granted an injunction. My Lords, I must not be taken as necessarily assenting to the view taken by the then Master of the Rolls upon a restriction so extremely wide as that with which he was dealing; it will be time enough for this House to pronounce upon it if and when such a case arises. But, confining myself to the restriction which is under consideration in this case, in my

(1) (1875) 44 L. J. (Ch.) 660, 661.

H. L. (E.) 1921 FITCH v. DEWES.

judgment the attack upon it fails. It was a restriction reasonable under all the circumstances of the case, and in no way opposed to public policy. I move your Lordships therefore that the appeal be dismissed with costs.

VISCOUNT CAVE. My Lords, this is a contract in restraint of trade, and the question which we have to consider is this, whether the contract is so unrestricted in space or time, or both, as to render it unreasonable in reference either to the interests of the contracting parties or to the interest of the public. That the contract in this case is reasonably restricted as regards space is not in dispute. The restriction is confined to a radius of seven miles from the Town Hall at Tamworth, and only excludes the covenantor from practising in an area containing a population of about 20,000. No one would say that that is an unreasonable restriction. As regards time there is no limit other than the life of the person entering into the contract, and the question is whether the clause is on that ground unreasonable from either point of view. But in considering that question we must not entirely put out of sight the limit of space, which may have a bearing upon the question arising as to the limit of time.

My Lords, it has been settled (I think) since *Hitchcock* v. *Coker* (1), that where there is a goodwill to be protected a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, and this although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life. Here the practice to be protected is that of a solicitor, to which a goodwill is no doubt attached. It is manifest that a person employed in such a practice as managing clerk must in the course of his duties acquire a knowledge of the affairs, the documents and the disposition of the clients of the business such as to give him a special equipment which he could, if not restrained by contract, use in obtaining employment as their legal

(1) (1837) 6 Ad. & E. 438.

adviser and that in this manner the goodwill of the employer's business might be impaired and perhaps destroyed. Now the object being to protect the employer's business against the use of that special advantage, was it unreasonable to extend this covenant to the life of the employee ? I think not. It is impossible to say that there must in every case be some specified limit of time defined by a figure. Nor can we say that the contract ought to be confined to the life of the covenantee, for he might die in the next year or so and the goodwill might then be lost to his successors. It was no doubt thought necessary to continue the protection throughout the period during which the covenantee and his successors in interest might carry on the practice, and for that purpose to bind the appellant (so far as the limited area was concerned) for the remainder of his life. I cannot think that in the circumstances of this case the restriction imposed was unreasonable from any point of view, and accordingly I agree that the appeal fails and should be dismissed.

LORD SUMNER. My Lords, I think the judgments below are right and I concur in the motion which has been proposed from the Woolsack.

LORD PARMOOR. My Lords, I concur in the motion which has been made and I agree that on both tests the agreement in restraint of trade is in this case reasonable.

The first question to be asked is whether the covenant is reasonable in the interests of the parties, and the only test of reasonableness between the parties is whether the covenant affords any more than adequate protection for the party in whose favour it is imposed. It is not a question of consideration between the parties, but whether the party in whose interests the restriction is imposed is seeking to obtain more than adequate protection.

The area of limitation is no more than is required. The limitation of time having regard to the business of a solicitor, is not too wide in its application. It is no more than adequate protection for a solicitor who desires to protect his professional

H. L. (E.) 1921 — FITCH v. DEWES. — Lord Parmoor.

secrets and to protect his clients from being enticed away by a former clerk who has had access to all his papers and has been in direct personal relation with a number of his clients. I should adopt myself the words used by Younger L.J., who says that the covenant does no more than protect the professional connection of the respondent, who is a solicitor.

I think there is no public interest involved, and I concur in the motion proposed from the Woolsack.

LORD CARSON. My Lords, I concur in the motion which has been proposed by the noble and learned Lord on the Woolsack for the reasons given by him.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 2, 1921.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for James, Barton & Kentish, Birmingham.*

Solicitors for the respondent: *Andrew, Wood, Purves & Sutton, for J. H. Dewes, Tamworth.*

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE APPELLANTS ; H. L. (E.)* 1921 June 3.

AND

BLOTT . . . . . RESPONDENT.

COMMISSIONERS OF INLAND REVENUE APPELLANTS ;

AND

GREENWOOD . . . . . RESPONDENT.

Revenue—Super-tax—Assessment—Shareholder in Company—Distribution of Dividends in the Form of fully paid Shares—Capital or Income—Liability of Shareholder to Super-tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 54, 163, 164—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

An assessment to super-tax under the Finance (1909–10) Act, 1910, was made upon the respondent for a certain year in respect of an allotment to him of bonus shares in a limited company. In the previous year the company, in exercise of a power in that behalf conferred by its articles, had passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing in satisfaction of that bonus a distribution among the shareholders of certain of its unissued shares credited as fully paid up, and the respondent's said shares had been allotted to him pursuant to that resolution :—

Held, by Viscount Haldane, Viscount Finlay and Viscount Cave, Lord Dunedin and Lord Sumner dissenting, that for the purposes of the super-tax the shares so allotted to the respondent could not be treated as part of his "total income from all sources for the previous year" within the meaning of s. 66, sub-s. 2, of the Act, inasmuch as they were not part of his income but were an addition to his capital in that year.

Bouch v. *Sproule* (1887) 12 App. Cas. 385 applied.

Swan Brewery Co. v. *The King* [1914] A. C. 231 distinguished.

Decision of the Court of Appeal [1920] 2 K. B. 657 affirmed.

APPEALS from a decision of the Court of Appeal (1) affirming a decision of Rowlatt J. (2) in both cases.

The question for decision on these appeals was substantially whether a dividend of a limited company declared out of its current annual profits and distributed in the form of shares of the company was income of the recipient for the purposes of super-tax—i.e., whether it was part of the recipient's

* *Present :* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD SUMNER.

(1) [1920] 2 K. B. 657. (2) [1920] 1 K. B. 114.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.

"total income from all sources" within s. 66 of the Finance (1909–10) Act, 1910, or whether it was exempt from super-tax by reason of its having become capital.

Rowlatt J., affirming a decision of the Commissioners for Special Purposes of the Income Tax Acts, held that for the purposes of the super-tax the bonus shares could not be treated as income, but were an addition to the capital of the shareholder, and his decision was affirmed by the Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.).

There was no material distinction between the facts of the two cases. The facts of both cases are stated in the report before Rowlatt J., and the facts in *Blott's Case* are also set out in the judgment of Viscount Finlay.

1921. March 10, 11, 14, 15.

Sir Gordon Hewart A.-G. and *Cunliffe K.C.* (with them *Reginald Hills*) for the appellants. The question for determination is whether dividends of a limited company paid out of its current profits in the shape of bonus shares form part of the income of the shareholders for the purpose of super-tax. The company was deliberately distributing these profits among the shareholders in a way which would enable them to evade payment of super-tax. The shares were issued as fully paid up and it was out of the power of the company to issue these shares unless they were paid up by some one other than the company. There were therefore really two stages in this transaction: first, a notional payment of dividends to the shareholder, and, secondly, a notional payment back by the shareholder in the purchase of the shares. The primary object of the company in this transaction was the distribution of its current profits amongst the shareholders, and this it effected by the declaration of a further dividend and payment of that dividend in a particular manner; and just as a dividend cannot be limited to a dividend in cash, so payment cannot be limited to parment in cash. The shareholder by this means gets money or money's worth, and if what he receives can be converted into money that is subject to income tax: *Tennant* v.

Smith (1); *Californian Copper Syndicate* v. *Harris* (2); *Corke* v. *Fry*. (3) This is a distribution of current profits, which are liable to income tax, and the particular form of distribution cannot prevent a shareholder from being liable for super-tax, which is a form of income tax.

[They referred to Income Tax Act, 1842, tit., ss. 54, 100, Sch. D, 163, 164; Income Tax Act, 1853, tit., ss. 2, 5; Finance (1909–10) Act, 1910, s. 66.]

Bouch v. *Sproule* (4), by which the Court of Appeal considered itself bound, does not apply. The whole question there was as to the intention of the testator, whose position was similar to that of the respondent in this case, in dividing his property between tenant for life and remainderman, and the decision has no bearing upon the question whether a distribution by a company of annual profits in the shape of shares amongst its shareholders constitutes a taxable profit in their hands under the Income Tax Acts. If the Crown had been represented in that case it could not have been doubted that profits so distributed would have been held liable to income tax, notwithstanding that as between tenant for life and remainderman they were to be regarded as capital. On the other hand the decision of the Privy Council in *Swan Brewery Co.* v. *The King* (5) applies by analogy. The controversy there was similar to that in the present case. It is true that the decision was upon the terms of a Colonial Act, but the reasoning of Lord Sumner, in delivering the judgment of himself, Lord Moulton and Lord Parker of Waddington, is directly in point. It cannot be said that the taxpayer is not liable in respect of dividends which are paid tax free. The company pays income tax on the profits which are distributed as agent for its shareholders whether the dividend is paid free of income tax or not: *Samuel* v. *Inland Revenue Commissioners*. (6)

[They also referred to *Eisner* v. *Macomber* (7); *Towne* v. *Eisner*. (8)]

(1) [1892] A. C. 150, 156, 165.
(2) (1904) 5 Tax Cas. 159, 167.
(3) (1895) 3 Tax Cas. 335.
(4) 12 App. Cas. 385.
(5) [1914] A. C. 231.
(6) [1918] 2 K. B. 553.
(7) (1920) 252 U. S. 189.
(8) (1918) 245 U. S. 418.

H. L. (E.) 1921 — INLAND REVENUE COMMISSIONERS v. BLOTT. — INLAND REVENUE COMMISSIONERS v. GREENWOOD.

Sir John Simon K.C. appeared with *A. M. Latter* for the respondent Blott and with *Clauson K.C.* and *A. M. Bremner* for the respondent Greenwood.

The case for the several respondents was argued by

Sir John Simon K.C. and *Clauson K.C.* A company pays on its current profits because it is a taxpayer. Assume that a company makes a profit, one of three things may happen. First, it may declare a dividend in the ordinary way, and in that case the company is entitled to subtract a proportionate amount of tax from the dividend, and if the shareholder's income is so large as to attract super-tax he will have to account for that. Secondly, instead of distributing its profits, it may put a certain amount to reserve fund. That is only a reserve pro tem. available in the company's hands as floating capital. The shareholder has not to account for any portion of that fund. Thirdly, the company may, in the exercise of its powers of domestic management, take that reserve fund and strike it permanently with the character of capital. Can that fact put the shareholder in the position of having in law received additional profit? It is within the constitutional powers of a company either temporarily or permanently to capitalize its undivided profits and it thereby puts it out of its power to distribute the sum so capitalized as profits. Lord Watson in *Bouch* v. *Sproule* (1) states the respondent's case. A company is not bound to divide the whole of its profits amongst the shareholders: Buckley on Companies, 9th ed., p. 648; *Burland* v. *Earle*. (2) Nor has a shareholder any right to a share of the profits until a dividend is declared; his right to sue commences from the declaration of the dividend: *Bond* v. *Barrow Hæmatite Steel Co.* (3), per Farwell J., quoting Lindley on Companies, 5th ed., p. 437; *In re Severn and Wye, &c., Ry. Co.* (4) Here it is admitted that the shareholder could not sue for a share of the profits; all he could ask for was his share of the additional statutory capital. The power of a company to issue fully paid shares has varied at different stages in the

(1) 12 App. Cas. 402–3.
(2) [1902] A. C. 83, 95.
(3) [1902] 1 Ch. 353, 362.
(4) [1896] 1 Ch. 559.

history of the law of companies. Down to 1867 a company could issue its shares as fully paid within the limits of its authorized capital without any registered contract so long as their face value was represented by money or money's worth, wherever the money came from: *In re Barton's Trust.* (1) Then came the Companies Act of 1867, which, by s. 25, required that a contract in writing should be filed with the Registrar before the issue of such shares. That section was, however, repealed by the Companies Act, 1900, s. 33, and was replaced by s. 7 of that Act, which is now reproduced by s. 88 of the Companies (Consolidation) Act, 1908. The position now is that the company is required within a month of allotment to file with the Registrar a contract in writing or a declaration recording by what means the money is found and if default is made any officer of the company who is knowingly party to the default is liable to a penalty; but default does not render the shareholder liable. The liberty of the company to issue additional shares within its authorized capital out of reserve profits is now unlimited, subject to the imposition of penalties upon the officers of the company where the contract is not registered. *Eisner* v. *Macomber* (2), a decision of the Supreme Court of the United States, is instructive. There the question was whether an Act charging income tax on stock dividends—i.e., bonus shares—was authorized by the Constitution—in other words the question was whether this was a genuine income tax. On the only point which is relevant to the present case the judgment was unanimous. It was held that bonus shares were capital as well for the purposes of income tax law as for the adjustment of the rights between tenant for life and remainderman. The point is that the shareholder has now got a capital asset and that the same thing cannot be at the same time capital in the hands of the company and income in the hands of the shareholder. As regards the structure of the Income Tax Acts and the enactments relating to super-tax in the Finance (1909–10) Act, 1910, it is a fallacy to say that when a company pays income

(1) (1868) L. R. 5 Eq. 238, 244. (2) 252 U. S. 189.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.

tax it is acting as agent for the shareholder. The Income Tax Acts, so far as Sch. D is concerned, are taxing every description of property or profits in the hands of the taxpayer that makes the profits. That person here is the juristic person, the company, which pays the tax under s. 40 of the Income Tax Act of 1842. There are several respects in which it is inaccurate to say that when the company in distributing dividends makes a deduction in respect of income tax that is the same thing as the income tax which the company has paid. The amount of the income tax payable by the company is paid on the average of the three previous years, whereas the amount distributed is not so ascertained; the company commonly does not distribute the exact amount of its current profits; the profits to be distributed may be accumulated profits which have been made at a period when the income tax was at a different rate; and, lastly, the company will pay income tax on the proper assessed figures at a time when the shareholders are different persons. These considerations show that the amount deducted does not correspond with the amount of tax paid by the company and that the right to deduct is not based on indemnity on the footing of agency. The deduction is made by virtue of a statutory right conferred by s. 54 of the Act of 1842. This question is really concluded by *Scottish Union and National Insurance Co.* v. *New Zealand Land Co.* (1)

[They also referred on this point to *Purdie* v. *The King* (2); *Johnston* v. *Chestergate Hat Manufacturing Co.* (3); *Brooke* v. *Inland Revenue Commissioners* (4); *Ashton Gas Co.* v. *Attorney-General* (5); *In re Condran* (6); *Patent Castings Syndicate* v. *Etherington.* (7)]

Applying this to the super-tax provisions of the Finance Act of 1910; for the purposes of the super-tax the total income of the taxpayer is to be taken to be his total income from all sources of the previous year estimated

(1) [1921] 1 A. C. 172, 181–2.
(2) [1914] 3 K. B. 112, 116.
(3) [1915] 2 Ch. 338, 343–4.
(4) [1918] 1 K. B. 257, 267, 270.
(5) [1906] A. C. 10.
(6) [1917] 1 Ch. 639, 644.
(7) [1919] 2 Ch. 254, 269.

in the same manner as the total income is estimated for exemptions or abatements under the Income Tax Acts. That language clearly does not apply to the allotment of a bonus share. Take the case of exemption—a shareholder having a bonus share and nothing else could not claim exemption in respect of it, because he never paid income tax upon it. Super-tax is assessed on income which the man would receive if there were no income tax.

[They also referred to *Williams* v. *Singer*. (1)]

Reginald Hills, by the indulgence of the House, was permitted to reply in the unavoidable absence of both his learned leaders.

In substance this is a distribution of current annual profits in the form of money's worth, which it is conceded is for the purpose of this appeal equivalent to money, and if there are profits in the hands of the shareholder it is quite irrelevant for income tax purposes how he applies those profits: *Port of London Authority* v. *Orsett Union Assessment Committee*. (2) It is said that what the company has declared to be capital is capital for all purposes, but what a company calls its capital is not necessarily capital in the hands of somebody else. If bonus shares are paid as remuneration for services they would be income in the hands of the recipient: *Californian Copper Syndicate* v. *Harris*. (3) It is not necessary to contend that the company in deducting income tax acts as the agent of the shareholder, if it is understood that the income tax is paid on his behalf. It is the shareholder who pays the tax and who can get it back under the exemption sections: *London County Council* v. *Attorney-General* (4); *Attorney-General* v. *Ashton Gas Co.* (5); *Patent Castings Syndicate* v. *Etherington*. (6) It is settled law that a company cannot purchase its own shares, and that there is an obligation on the shareholder to pay for shares issued as fully paid in money or money's worth: *Trevor* v. *Whitworth* (7); *Bellerby* v.

(1) [1921] 1 A. C. 65.
(2) [1920] A. C. 273.
(3) 5 Tax Cas. 159, 167–8.
(4) [1901] A. C. 26, 42.
(5) [1904] 2 Ch. 621, 629; affirmed [1906] A. C. 10.
(6) [1919] 1 Ch. 306, 313.
(7) (1887) 12 App. Cas. 409.

H. L. (E.) 1921

INLAND REVENUE COMMISSIONERS v. BLOTT.

INLAND REVENUE COMMISSIONERS v. GREENWOOD.

Rowland and Marwood's Steamship Co. (1); *In re Wragg* (2); *In re Eddystone Marine Insurance Co.* (3); *General Property Investment Co.* v. *Matheson's Trustees.* (4)

The House took time for consideration.

1921. June 3. VISCOUNT HALDANE. My Lords, the respondent in the first of these cases was a shareholder in a joint stock company, incorporated in 1895 under the then Companies Acts. Its purpose, as defined by the memorandum of association, was to manufacture and trade in leather goods. Under the articles of association, after providing for the distribution of profits by way of dividend, provision was made by art. 127 enabling a general meeting, among other things, to direct payment of dividend wholly or in part by the distribution of specific assets and, in particular, of paid-up shares in the company. By art. 128 the directors were empowered, before recommending any dividend, to set aside out of profits a reserve fund, to be applicable for, among other purposes, distribution by way of bonus among the members of the company for the time being, on such terms and in such manner as should be determined in general meeting. At the end of the years 1914 and 1915 there were in hand, after payment of dividends, surplus undivided profits, and on February 8, 1915, the shareholders resolved in general meeting to capitalize over 33,000*l.*, being part of the undivided profits, and that, accordingly, "a bonus at the rate of 33½ per cent. per share, free of income tax, on each of the issued ordinary shares of the company be and the same is hereby declared and that the directors be and they are hereby authorized to satisfy such bonus by distribution rateably among the members holding ordinary shares of 33,316 of the unissued second preference shares of 1*l.* each in the company credited as fully paid in satisfaction of such bonus." In the following year, on February 7, a similar resolution was passed by which 50,000*l.*, part of the undivided profits for

(1) [1902] 2 Ch. 14, 22, 32.
(2) [1897] 1 Ch. 796, 829.
(3) [1893] 3 Ch. 9.
(4) (1888) 16 R. 282.

the preceding year, was capitalized, and a bonus of 50 per cent. was in like manner declared on each of the issued ordinary shares, and the directors were in like manner authorized to satisfy the bonus by the distribution of 50,000 second preference unissued shares of 1*l.* each, credited as fully paid up. Among the shareholders who received some of these bonus shares was the respondent. He neither paid nor received any cash in respect of them, but simply became an allottee of part of the unissued shares. Agreements between the company and persons acting on behalf of the holders of ordinary shares in the company for an allotment of these shares in pursuance of the resolutions I have quoted, were executed and filed to satisfy the requirements of the Companies Act as to shares issued otherwise than for cash.

The question which arises for decision in this appeal is whether the respondent is liable for super-tax on his share in the benefits I have referred to. Super-tax arose under the Finance (1910–10) Act, 1910, which provided that, in addition to the income tax to be charged under that Act, there should be charged in respect of the income of any individual the total of which exceeded a prescribed limit an additional duty of income tax, called a super-tax, leviable on the total income for the preceding year. The income assessable for super-tax is to be estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts, subject to variations which are not material for the purposes of the question before us. What we have to decide is whether the allotment of bonus shares to the respondent was capital, or was in reality an allotment of annual profits which conferred a benefit chargeable in his hands with income tax, for if so it is not in controversy that the super-tax provisions will apply. The Special Commissioners for Income Tax have stated a case. They decided that the respondent was not liable to super-tax, because of the concurrence of previous decisions by the Commissioners that the judgment of this House in *Bouch* v. *Sproule* (1) governed this case. They

(1) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Viscount Haldane.

intimated, however, that, had they felt themselves free, they would have come to a different conclusion. Rowlatt J. also took the view, but on more general grounds, that the respondent was not liable, and the Court of Appeal have unanimously affirmed his decision.

My Lords, the contention of the Crown is briefly this. It is said first that the respondent's original shares in the company were a source of profits, and that the further benefits in question arose out of these profits and really formed part of them. It is said further that in the reports of the directors which the resolution of the general meeting carried out, it was proposed to declare a dividend out of profits in the hands of the company to the ordinary shareholders to be satisfied by an allotment of shares. But the report did not, any more than the resolutions, recommend that this dividend, whatever the expression signified, should be paid in cash, and the resolutions, which are the operative factors in determining the titles conferred, give no right to shareholders to receive anything more than shares. Even if the expression "dividend" used in the directors' reports had been repeated in the resolutions, which it was not, I do not think that in its context it could be taken as meaning more than that something should be divided, either as capital or as income. The Crown further says that the so-called dividends, in whatever form distributed, imported a distribution of the annual profits of the company to its shareholders as income, and that it was not open to the company, under the Companies Acts, to retain the amount in satisfaction of liability on the shares issued. My Lords, there is no doubt that the money in question formed originally part of profits made by the company on which it was liable to pay income tax. It is quite another question whether these profits as such ever reached the respondent and the other shareholders as income so as to make them liable for income tax and entitled to a deduction on the score that the tax had already been paid by the company. It is further contended that the decision of this House in *Bouch* v. *Sproule* (1), to the effect that a

(1) 12 App. Cas. 385.

distribution of new shares to shareholders in a certain company was a distribution of capital and not of income, is relevant only in such cases as that which it decided, where the question is one between tenant for life and remainderman, depending on the construction of a testator's intention, and that the decision has no application to the question whether a distribution by a company of annual profits, applied to paying up the liability on further shares issued to a shareholder who is an absolute owner, gives rise to a taxable profit in the nature of income in his hands. For the respondent it is argued that the distribution was one of capital and not of income, and was made such for all purposes by the decision of the company itself to that effect. *Bouch* v. *Sproule* (1) is relied on as decisive of the principle to be applied, as being that the company itself can decide conclusively whether what is given is given as capital or income. It is further said that the increase in the number of shares entitled to participate did not increase the quantum of the total interest of the respondent in the capital of the company, and that at no time did the respondent acquire a right to demand any part of the profits, added by it to capital, from the company.

My Lords, the questions so raised are of much importance. Speaking for myself, I think that they can only be answered if the relation of a shareholder to a company incorporated under the relevant Companies Acts, as they stood both before and after their consolidation in 1908, has been determined. It must be borne in mind that the provisions of the Companies (Consolidation Act) of 1908, with the powers it confers, apply, where the context does not exclude this, to existing companies incorporated under the Act of 1862 as well as to new companies. My Lords, as I understand the law relating to companies to which the Act of 1908 applies, as it does in the present case, the position of such a company is this. It can do nothing which is not authorized by its memorandum of association, excepting so far as the Act expressly enables it to do so. But one of the powers which the Act expressly gives to it is that of increasing its capital as named in the

(1) 12 App. Cas. 385.

H. L. (E.) 1921 — INLAND REVENUE COMMISSIONERS v. BLOTT. — INLAND REVENUE COMMISSIONERS v. GREENWOOD. — Viscount Haldane.

memorandum. Such a company is a corporate entity separate from its shareholders, but the latter can control its action by passing resolutions in general meeting. If these resolutions are directed to what falls within the capacity of the company as the Act of Parliament defines it, they are treated as concerned with internal management, and if they have been passed in accordance with the statute and the articles of association no Court has jurisdiction to interfere in a question which is for the proper majority of the shareholders alone. The company, acting with the assent so given of the shareholders, can decide conclusively what is to be done with accumulated profits. It need not pay these over to the shareholders. It can convert them into capital as against the whole world, including, as I think the principle plainly implies, the Crown claiming for taxing or for any other purposes. The only question open is, therefore, whether the company has really done so.

If there were any doubt as to the power of the company, in point of principle, to convert such accumulated profits into capital, it seems to me that the principle is recognized by s. 40 of the Act of 1908, which expressly enables a company to return accumulated profits in reduction of the paid-up capital of the company. Clearly on such a return the profits cease to be income and become capital. But the general principle does not rest merely on this section. It appears to follow from reasons of a wider kind. A shareholder is not entitled to claim that the company should apply its undivided profits in payment to him of dividend. Whether it must do so or not is matter of internal management to be decided by the majority of the shareholders. He cannot sue for such a dividend until he has been given a special title by its declaration. Until then, no doubt, the profits are profits in the hands of the company until it has properly disposed of them, and it is assessable for income tax in respect of these profits. But if, acting within its powers, it disposes of these profits by converting them into capital instead of paying them over to the shareholders, that, as I conceive it, is conclusive as against all the outside world,

including the Crown, and the form of the benefit which the shareholder receives from the money in the hands of the company is one which is for determination by the company alone. Subject to anything to the contrary provided in the articles, the directors where, as is usually the case, there are directors, exercise the powers of the company as its agents. On their powers to deal with share capital, and on the power in this regard of the company itself, there are well known restrictions. These appear in the group of sections in the Act of 1908, which commences with s. 40. That section expressly enables the company, when it has accumulated undivided profits, instead of dividing them as dividend or bonus, to return them, on complying with certain formalities, to the shareholders in reduction of capital actually paid up on their shares, the liability for what will thus remain unpaid being increased proportionally. This section is concerned with shares that have been issued and paid up in part or entirely. The next section, among other things, enables the company to cancel unissued shares without the diminution of nominal capital thereby occasioned becoming a reduction of share capital within the meaning of the Act. Sect. 46 confers a general power, subject to confirmation by the Court, to reduce share capital by extinguishing unpaid liability, or by cancelling lost paid-up capital, or by paying back paid-up share capital, which is in excess of the wants of the company.

My Lords, none of the provisions which I have just referred to affect the question before us excepting on one point. They do show that when a company has share capital which has remained unissued, it is free to cancel it as the alternative to issuing it. Nowhere in either the Act of 1908 or in the earlier Acts is there any provision restricting its capacity, if the memorandum of association permits of it, to apply funds, which form no part of its share capital, but are surplus profits at its disposal, in providing for the benefit of shareholders who desire to take up unissued capital the funds requisite for so doing, and to apply such funds directly to the purpose. On a liquidation, these funds would have

H. L. (E.) 1921 — INLAND REVENUE COMMISSIONERS v. BLOTT. — INLAND REVENUE COMMISSIONERS v. GREENWOOD. — Viscount Haldane.

belonged to the existing shareholders as surplus assets. While the company is a going concern, clauses Y. and Z. of the memorandum of association expressly enable the company to distribute among the members in specie any property or proceeds of property of the company, so long as this does not amount to a reduction of capital requiring sanction by law, and to do anything conducive to such an object. There was, therefore, power conferred on the company to do what was done in the case before us. It was, doubtless, an act for which it was expedient, if not necessary, to have the direction of the shareholders in general meeting, and by the 127th and 128th articles of association, which I have already quoted, express provision on the point is made. It is by no means certain that the majority in such a general meeting would consist of persons liable to super-tax and assembling to devise a method of escaping it. Why, as matter of law, if they were such, they should not attempt to escape it by any means that is not made unlawful I do not see. But even this question does not necessarily arise. The majority may on any occasion consist of persons who escape from super-tax, because their incomes, even with the additions to be derived from the distribution by the company, are below the level required for the tax. My Lords, for the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company. His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where

they were. The new shares simply confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place as in a winding up. In these assets the undistributed profits now allocated to capital will be included, profits which will be used by the company for its business but henceforth as part of its issued share capital. Such a transaction appears to me to be one purely of internal management, with which, for the reasons explained by Lord Davey in *Burland* v. *Earle* (1), no Court can interfere.

But, my Lords, I do not think that the matter is one which rests merely on principle. It appears to me that the Court of Appeal have rightly held that the question is concluded adversely to the contention of the Crown by the decision of this House in *Bouch* v. *Sproule*. (2) In that case a testator had bequeathed his residuary estate in trust for his wife for life and after her death to somebody else absolutely. Part of the residue consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserve fund for certain purposes. On the recommendation of the directors the company by special resolution passed a new article empowering the directors with the sanction of the company (afterwards given) to declare a bonus to be paid to the shareholders out of the reserve fund with its purposes so enlarged, or out of any other accumulated profits, in proportion to their shares. The directors then issued a letter giving effect to this in a fashion which they had recommended in a report approved by the shareholders. They allotted to each shareholder new shares in proportion to his existing holding, crediting the amount taken from the reserve fund as paid up on the new shares. There was an ambiguity in the terms on which the directors made their communication to the shareholders which was thought by the Court of Appeal to have left open the view that the allocation was one substantially of dividend out of profits, claimable as such. On that point this House differed from the Court of Appeal, holding that the allocation by the company

(1) [1902] A. C. 83, 93. (2) 12 App. Cas. 385.

H. L. (E.) 1921

INLAND REVENUE COMMISSIONERS v. BLOTT.

INLAND REVENUE COMMISSIONERS v. GREENWOOD.

Viscount Haldane.

must be taken as having in substance been one to be treated as of capital. In connection with this question old authorities in analogous cases were discussed, but in reality only on the point of construction of the intention shown. On the main question, which is the question really relevant to what we have to determine in the present appeal, this House laid down distinctly what it held to be the law. Lord Herschell says (1): "I quite agree with the Court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and in my opinion the only sound principle, is that which is well expressed in the judgment of Lord Justice Fry: 'When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.'" Lord Watson says (2): "In these circumstances it was undoubtedly within the power of the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalise these sums by issuing new shares against them to its members in proportion to their several interests." My Lords, it is contended for the Crown that in using this language Lord Herschell and Lord Watson were doing no more than stating a principle which was to apply merely to the respective rights of a tenant for life and a remainderman, and were merely guarding against the application of the well known rule laid down by Lord Eldon in *Howe* v. *Lord Dartmouth* (3), that where there is a residuary

(1) 12 App. Cas. 397. (2) Ibid. 402. (3) (1802) 7 Ves. 137*a*.

bequest to persons in succession, and no trust for conversion, and such property is not invested in securities which would be approved by the Court, then, unless there is an express or implied statement of the testator's intention that such property is to be enjoyed in specie, the general rule is that the property is to be converted and properly invested. Now I think that it is evident that the noble and learned Lords would not have used the sweeping language they did had they not intended it to be taken as expressing a principle of much wider application. *Bouch* v. *Sproule* (1) was argued in April, 1886. Judgment was not given until June, 1887. In between, in March, 1887, the well known case of *Trevor* v. *Whitworth* (2), reported in the same volume, was heard. The question there was one very different from that now before us. It was whether a company incorporated under the Act of 1862 could purchase its own shares under a power purporting to be conferred by the articles, and it was held, reversing the opinion of the Court of Appeal, that it could not do so consistently with the provisions of the Companies Acts. What is important is that Lord Herschell, and Lord Watson also, sat to hear *Trevor* v. *Whitworth* (2), and that, in the course of the discussion, a minute examination was made of the principles and structure of the Acts as regards the power of a company to deal with its own capital. Judgment was given in July, 1887, very shortly after that in *Bouch* v. *Sproule*. (1) My Lords, it is hardly conceivable for those who remember the habitual accuracy in the use of language of these two noble and learned Lords that they should have said what they did unless they had in mind what came before them in the argument in *Trevor* v. *Whitworth* (2), and what was the subject of the subsequent judgment in that case. I think it is clear that they must have intended to lay down that none of the restrictions on a company transacting with regard to its own share capital applied to the case of a company using a reserve over which it had full power of disposition, in order to make payments out of it for the benefit of the existing shareholders of capital sums which they would

(1) 12 App. Cas. 385. (2) 12 App. Cas. 409.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Viscount Haldane.

otherwise have had to contribute for the purchase of new shares. I am, therefore, of opinion, both on principle and on authority, that the transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes, and I do not think that, in the circumstances of this case, the respondent received any income or profits at all. I think that Rowlatt J. and the Court of Appeal were right in the conclusion they came to, and that the Appeal of the Crown to your Lordships' House ought to fail.

My Lords, it is said that the point was decided otherwise by the Judicial Committee of the Privy Council in *Swan Brewery Company* v. *The King*. (1) There the transaction was in many respects analogous to that here. But the taxing statute was couched in very different language. The Dividend Duties Act, 1902, of Western Australia had imposed a duty on the amount or value of every dividend declared by companies there. Dividend was defined to include "every profit, advantage or gain intended to be paid or credited to or distributed among the members of the company." It was held that new shares which were issued to the shareholders and paid for out of accumulated reserve were "advantages," and so taxable. There were expressions in the judgment which may be construed as having gone rather further, and treated the payment made by the company as equivalent in substance to a payment by the company to the shareholders, and by them back to the company. It may have been so, and without a fuller knowledge of the facts in the case and of the local law than the report discloses, it is difficult to be quite sure about the point, but what is clear is that the wide character of the word "advantages" was a primary consideration in what was said by their Lordships who took part in advising His Majesty. I therefore do not feel embarrassed by the decision in that case. On the other hand I have not allowed myself to treat the decision of the Supreme Court of the United States in the case of *Eisner* v. *Macomber* (2) as a reason for the conclusions at

(1) [1914] A. C. 231. (2) 252 U. S. 189.

which I have arrived. For the taxing statute then in question was of a different order and the jurisprudence invoked was also on certain points different, but none the less I have read with great pleasure and instruction the judicial discussion in which the varying opinions of the eminent judges who decided the case occur. If I am right in the conclusion at which I have arrived it is agreed that this conclusion disposes also of the appeal which immediately follows in your Lordships' list.

VISCOUNT FINLAY. My Lords, the respondent was a shareholder in Hepburn, Gale, and Ross. In the income tax year ending April 5, 1915, he received from the company 500 fully paid-up second preference shares of the nominal value of 1*l.* each, and in the income tax year ending April 5, 1916, he received 750 like shares. He was assessed to super-tax in respect of these shares in each year, and the question in the case is whether these assessments were properly made. The Special Commissioners discharged these assessments. A case was stated for the opinion of the High Court, and the decision of the Special Commissioners was affirmed by Rowlatt J. and by the Court of Appeal. The present Appeal is brought for the purpose of having it established that super-tax is payable on these transactions. Super-tax is payable under the Finance (1909–1910) Act, 1910, in respect of the income of any individual, the total of which exceeds 5,000*l.*, as an additional duty of income tax (s. 66, sub-s. 1). For the purpose of the super-tax the total income is to be taken to be the total income of the individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purpose of exemptions or abatements under the Income Tax Act (s. 66, sub-s. 2). Income tax under Sch. D is levied under the Income Tax Act, 1853 (ss. 2 and 5), in accordance with the regulations of the Income Tax Act, 1842. Sect. 163 of the latter Act provides that any person who proves that the aggregate amount of his income is less than a certain amount, shall be exempted from income tax, and s. 164 provides that the

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Viscount Finlay.

claim for such exemption is to be sent to the Commissioners, together with a declaration and statement setting forth all the particular sources from which the income arises. For the purpose of super-tax the individual person is dealt with and income from every source is to be taken into account. The whole question in this case is whether the income of the respondent was increased by the transactions resulting in the issue of the second preference shares to which I have referred. The company had accumulated in each of the years 1915 and 1916 a considerable amount of profits. It was, of course, open to them to distribute these amounts by way of dividend to the shareholders. In each of these years, however, a resolution was passed that the profits in hand should be capitalized. The resolution in 1915 was dated February 8 and was in the following terms :—

"Resolved : 1. That it is desirable to capitalise the sum of 33,333*l.* 6*s.* 8*d.*, being part of the undivided profits of the company and accordingly that a bonus at the rate of 33⅓ per cent. per share, free of income tax, on each of the issued ordinary shares of the company be and the same is hereby declared and that the Directors be and they are hereby authorised to satisfy such bonus by the distribution among the members holding ordinary shares rateably of 33,316 of the unissued second preference shares of 1*l.* each in the Company credited as fully paid in satisfaction of such bonus.

"2. That so far as such distribution would otherwise involve the issue of fractional certificates for an amount less than 1*l.* such amount shall be paid and satisfied in cash."

The resolution in 1916 was in the same terms except that the amount to be capitalized was 50,000*l.* and the procedure adopted in the two years was identical. For convenience I take the year 1915.

On the same day on which the resolution was passed an agreement was entered into between the company and S. J. Bradford on behalf of the shareholders, in which the resolution above set out was recited as also the appointment of Bradford by the directors, pursuant to the 127th of the company's articles of association, to enter into the agreement.

The agreement went on to provide that the company allotted and issued the new second preference shares of 1*l.* each as specified in the schedule to the agreement, that the shares should be "credited as fully paid up," and that the shares so credited should be accepted in satisfaction of the bonus. In pursuance of these agreements there were allotted to the respondent the 500 and the 750 shares to which this litigation relates. The relative articles of association are No. 123 and those following it. Art. 123 provides that the profits of the company available for dividend shall, subject to the payment of preferential dividends, be applied in payment of dividends on the ordinary shares. No dividend or bonus was to be payable except out of profits (art. 125). Art. 127 reads as follows :—

"127. Any general meeting declaring a dividend may direct payment of such dividend wholly or in part by the distribution of specific assets, and in particular of paid-up shares of the Company or paid-up shares of any other Company, and the Directors shall give effect to such resolution, and, where any difficulty arises in regard to the distribution, they may settle the same as they think expedient, and in particular may issue fractional certificates, and may fix the value for distribution of such specific assets, or any part thereof, and may determine that cash payments shall be made to any members upon the footing of the value so fixed, in order to adjust the rights of all parties, and may vest any such specific assets in trustees upon such trusts for the persons entitled to the dividend as may seem expedient to the Directors. Where requisite, a proper contract shall be filed in accordance with section 88 of the Companies (Consolidation) Act, 1908, and the Directors may appoint any person to sign such contract on behalf of the persons entitled to the dividend, and such appointment shall be effective."

Art. 128 provides for the formation of a reserve fund. The article numbered 127A was not passed until February 18, 1918, and it was confirmed on March 5, 1918, so that it does not directly affect the case in its operation. But it has been a good deal referred to in argument for the purpose of throwing

H. L. (E.) 1921 INLAND REVENUE COMMISSIONERS v. BLOTT. INLAND REVENUE COMMISSIONERS v. GREENWOOD. Viscount Finlay.

light upon the nature of these transactions. Art. 127A is as follows :—

"127A. The Company may at any time and from time to time in General Meeting by Resolution authorise the Directors to capitalise any profits of the Company not required for the time being for payment of Dividend upon any Preference Shares of the Company or other shares issued upon special conditions, whether standing to the credit of the Company's Reserve Fund or otherwise, and including profits arising from the appreciation in value of Capital Assets, and to allot to the members holding Ordinary Shares of the Company in respect of the net amount capitalised fully paid Shares of the Company of equivalent nominal amount, and the Directors shall give effect to any such Resolution accordingly, and any shares allotted pursuant to any such Resolution shall be distributed among the members holding Ordinary Shares of the Company so far as practicable in proportion to the number of Ordinary Shares held by them respectively, and shall be credited as fully paid by means of the profits so capitalised, and the Directors may make such provision by the issue of fractional certificates or by the payment of cash or by sale and distribution of the proceeds or otherwise as they may think expedient for the case of fractions." The claim of the Crown to super-tax has been put in two ways: (1.) It was said that these transactions involved the payment of the dividend or bonus to the shareholders and that this rendered them liable to super-tax in respect of it, notwithstanding its return to the company in respect of the new shares issued. (2.) It was said that the allotment of the new shares amounted to a payment to the several shareholders of the dividends, though not in money but in money's worth.

The general scope and effect of these transactions is beyond dispute. There was an increase in the capital of the company by the retention of the amounts available for dividends. Though the number of shares was increased by the issue of the new preference shares to the ordinary shareholders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the shareholders

received these new preference shares, so that the proportion in which they were to share in any profits remained the same. As the capital was increased it might reasonably be expected that the profits of the company would be increased, and that the shareholders would benefit in this way, but their relative shares in the undertaking remained the same. The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future. So far as the present was concerned there was no dividend out of the accumulated profits; these were devoted to increasing the capital of the company. The company had power to do what it pleased with any profits which it might make. It might spend the accumulated profits in the improvement of the company's works and buildings and machinery. These improvements might lead to a great accession of business and increase of profits by which every shareholder would benefit, but of course it could not for a moment be contended that such a benefit would render him liable to super-tax in respect of it. The benefit would not be in the nature of income, and super-tax can be levied only on income. It would be so levied on the dividends afterwards received. "It was equally within the power of the company" (I am using Lord Watson's words in *Bouch* v. *Sproule* (1)) "to capitalise these sums by issuing new shares against them to its members in proportion to their several interests." This is what the company did in the present case. Art. 127A now enables them to do anything of this kind by a direct and simple process. Under it the directors may be authorized to capitalize any profits and to allot to the ordinary shareholders in respect of the net amount capitalized fully paid-up shares of the company of an equivalent nominal amount. This article, however, did not come into existence until 1918. It appears to me that there is no ground for saying that art. 127A is ultra vires. The company has power to capitalize these profits if it pleases, and such an

(1) 12 App. Cas. 403.

H. L. (E.) 1921

INLAND REVENUE COMMISSIONERS v. BLOTT.

INLAND REVENUE COMMISSIONERS v. GREENWOOD.

Viscount Finlay.

article as this enables them to carry out the process of capitalization in a direct and simple fashion. But before art. 127A was passed the machinery for carrying out capitalization of profits had to be found in the other articles.

The article under which the capitalization was carried out in 1915 and 1916 was art. 127, which provides that any general meeting declaring a dividend may direct payment of it by the distribution of paid-up shares of the company, a proper contract, where necessary, being filed in accordance with s. 88 of the Companies (Consolidation) Act, 1908. The resolution of February 8, 1915, was, that for the purposes of capitalizing 33,333*l.* 6*s.* 8*d.*, part of the undivided profits of the company, a bonus on each of the issued ordinary shares be declared, and that the directors be authorized to satisfy such bonus by the distribution among the members holding ordinary shares of 33,316 of the unissued second preference shares of 1*l.* each, credited as fully paid up. The effect of this operation was that the amount of the bonus was retained by the company as additional capital, and that the shareholders got the new preference shares. No option was left to any particular shareholder. He was compelled by the action of the company to take the preference shares. He could not have sued for the bonus in money, as the resolution which gave the bonus uno flatu declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems to me impossible to treat the shareholders for the purpose of super-tax as having received the bonus and paid it back to the company to be retained as capital. They never received it at all. The case appears to stand exactly as Rowlatt J. put it (1): "Now I do not think that there is a payment of a dividend to a shareholder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it, and he takes it. If, in this case, the company could have found means to capitalise their profits and divide them as capital without adopting the machinery of declaring a bonus and allotting shares by agreement (not, be it observed, a

(1) [1920] 1 K. B. 114, 133.

voluntary agreement) in satisfaction of such bonus, I do not think the case would have been arguable. I am asked to decide that there was a 'payment' of this bonus upon the strength of what I consider bare machinery. I cannot do so. The fact is simply that the shareholder was given shares instead of a bonus." There can be no super-tax upon income unless it has been received by the taxpayer. I may be permitted to quote in this connection what was said by Pitney J. in *Eisner* v. *Macomber* (1), a case decided in the Supreme Court of the United States in March of last year. In dealing with the definition of "income" Pitney J., in delivering the opinion of the majority of the members of the Court in that case, said: "Here we have the essential matter: not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal; that is income derived from property. Nothing else answers the description." In the present case the bonus or so-called dividend was not severed from the capital; on the contrary, it was added to it. For these reasons it appears to me that the first contention of the Crown must fail.

The second contention of the Crown is that the allotment of the preference shares was equivalent to the payment of the bonus. To appreciate this point it is necessary to consider closely what it was that the shareholder got. Did he get anything in the nature of payment of income? It is obvious that he did not. He gave up any claim to the income. What might have been paid as income went to increase the capital of the company. The shareholder got his proportionate share in the business of the company as increased by the additional capital. The proportion of his share in that business as compared with the proportions of other shareholders was in no way affected by the issue of the preference shares, as all the shareholders alike got them. The benefit, and the

(1) 252 U. S. 189, 207.

H. L. (E.) 1921

INLAND REVENUE COMMISSIONERS v. BLOTT.

INLAND REVENUE COMMISSIONERS v. GREENWOOD.

Viscount Finlay.

sole benefit, which the respondent derived was that the business in which he had a share was a larger one with more capital embarked in it, precisely as might have been the case if the accumulated profits had been applied in the improvement of the company's works and machinery. Instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business. How is it possible to treat any advantage accruing from this as a payment of income? The case differs toto cœlo from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or of securities. The preference shares are in themselves valueless. They are merely part of the machinery for carrying out the capitalization, and if that capitalization could have been carried out without their issue the respondent would have been just as well off without them as he is with them. What he gained was that the business in which he had the same proportionate interest had become more valuable owing to the increase of capital. Super-tax cannot be levied on such an increase in the capital value of the business. It will be received from time to time on the larger dividend, which it is hoped will be yielded by the increase in the capital put into the business. How much of the profits earned in the business of a company should be divided among the shareholders is a matter of the internal management of the company which the shareholders must decide for themselves: *Burland* v. *Earle*. (1) They decided this matter for themselves in the present case and the preference shares were within the limits of the authorized capital of the company. They did not pay over the accumulated profits to the shareholders to enable them to pay up the new shares. They issued the new shares as fully paid up as representing the increase of capital which resulted from the detention by the company of the money which might otherwise have been paid as dividend. The contract filed under s. 88 of the Companies (Consolidation) Act, 1908, states that the new shares credited as fully paid up

(1) [1902] A. C. 83, 95.

were to be taken in satisfaction of the bonus. If art. 127A had been in force in 1915 and 1916 the transaction would have assumed a simpler form, but the differences would have been one merely of machinery.

I now turn to the cases. *Bouch* v. *Sproule* (1) was invoked by the respondent. On behalf of the Crown it was said that that case was one merely as between tenant for life and remainderman, and that it had no bearing on the question as to whether duty was payable to the Crown. It is, however, to be observed that the question in that case, which was decided in the House of Lords after very mature consideration by Lord Herschell, Lord Watson, Lord Bramwell and Lord FitzGerald, was, as Lord Herschell says (1), whether a certain bonus of 2*l.* 10*s.* per share was income of the estate of William Bouch the testator or was capital of that estate. It was held to be capital. The question whether it was income or capital could not be affected by the purpose which led to the institution of the inquiry. The incidence of the taxation depends upon the question, What is in fact the nature of the property on which the tax is claimed? If it is income it is liable to tax upon income; if it is capital it is not so liable. The liability follows from the nature of the property, and it seems impossible to me to say that the answer to the question whether it is income or not is to depend upon the purpose with which the question is asked. The circumstances which gave rise to the case of *Bouch* v. *Sproule* (1) are very like those in the present case. They are stated at full length by Lord Herschell in his judgment. The Consett Iron Co. had a large amount standing to credit of reserve fund, and also an undivided profit fund. At a meeting of the company a resolution was passed for the payment of a bonus of 2*l.* 10*s.* per share out of the reserve fund and the undivided profit. A letter was sent to every shareholder enclosing a warrant and forms relating to the new shares. The letter to Sir T. Bouch, the trustee under the will of William Bouch, informed him that the directors had, in respect of his 600 shares, allotted to him 200 new shares

(1) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Viscount Finlay.

of 10*l.* each subject to 7*l.* 10*s.* being paid upon them by September 30, and there was enclosed a bonus dividend warrant payable on that date for 1500*l.*, with a request that it should be returned signed, when the amount would be applied in payment of the 7*l.* 10*s.* per share on the new shares. Sir T. Bouch signed the form acknowledging the receipt of the 1500*l.* and requesting that the amount should be applied in payment of the call of 7*l.* 10*s.* on the 200 new shares. Lord Herschell says (1): "I think we must look both at the substance and form of the transaction. It is to be observed, in the first place, that the amount of that portion of the new capital created which was to be paid up was exactly equal to the amount of profits to be distributed. And it was obviously contemplated, and was, I think, certain that no money would, in fact, pass from the company to the shareholders, but that the entire sum would remain in their hands as paid-up capital"; and he says that he could not avoid the conclusion that the substance of the whole transaction was to convert the undivided profits into paid-up capital upon newly created shares. In that case it was held that the capital of the company was increased by these amounts and that they did not constitute income. All that Lord Herschell there says applies a fortiori to the present case. In *Bouch* v. *Sproule* (2) there was a nominal option left to the shareholders as to the application of the bonus dividend. Lord Herschell held that this must be ignored, as it was nominal only and the circumstances showed it was never intended that it should be exercised. In the present case there was no option at all; the application of the bonus to increase of capital was compulsory. It was argued for the Crown that the 1500*l.* in the dividend warrant in *Bouch* v. *Sproule* (2) would have been assessable to income tax, as it had been paid. I cannot agree. On the facts as found by the House of Lords the receipt of this money by the shareholder was merely formal. It was not to be retained, but handed over to the company to go in increase of capital. There never was any effective payment of this dividend as such.

(1) 12 App. Cas. 398, 399. (2) 12 Ibid. 385.

Sir T. Bouch in receiving it acted as a mere conduit pipe for its transmission to the company to increase its capital. It was not received as income, but to be converted into capital of the company. In the present case there was no option at all, and there is no ground for saying that the bonus was ever received as income. The super-tax applies only to income and to income received in payment.

The case of *The Swan Brewery Co.* (1) was much relied on by the Crown. I must, however, confess that the reasoning on which the judgment is rested appears to me to be inconsistent with the decision of this House in *Bouch* v. *Sproule.* (2) By that decision we are of course bound even if we had any doubt about its correctness. In the case of *Eisner* v. *Macomber* (3) there is a most interesting and instructive judgment delivered by Pitney J. as representing five out of the nine members of the Court. There were two dissentients, Brandeis and Clarke JJ. Holmes and Day JJ., while dissenting on a point as to the construction of an amendment to the Constitution of the United States, concurred on the general question. That judgment is, of course, not binding on us as an authority, but it contains a most instructive review of the principles which have been discussed in the present case, and the conclusion, which was arrived at by seven out of the nine judges, is in entire harmony with that which appears to me to be the true view of the present case.

On these grounds I think that the present appeal ought to be dismissed.

VISCOUNT CAVE. My Lords, in *Blott's Case* the question to be determined on this appeal is whether, under the resolutions of February 8, 1915, and February 7, 1916, the respondent received anything which can be called income, so as to be assessable to super-tax under s. 66 of the Finance (1909–10) Act, 1910. I do not think he did. The circumstance that the profits dealt with by the above-mentioned resolutions were current profits of the company and had borne

(1) [1914] A. C. 231. (2) 12 App. Cas. 385.
(3) 252 U. S. 189.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Viscount Cave.

income tax in the company's hands is obviously not sufficient by itself to make them income of the shareholders. The company's profits were at its own disposal and were in no sense income of the shareholders unless and until they were distributed among them. The question is whether there was a distribution of profits among the shareholders in money or money's worth. When the resolution of 1915 (which I take as an example), with its attendant documents, is examined, it will be seen that the last thing which the company or its directors desired was that the profits in question should be divided among the shareholders. The directors reported that, the company having heavy commitments which called for all its available capital, it would be unwise to make any distribution beyond the usual dividends, and it was in order to avoid such a distribution that they recommended the shareholders to declare a further dividend to be satisfied in second preference shares. The notice referred only to an additional payment in shares. The resolution, which is the most important document, declared that it was desirable to capitalize the sum of 33,333*l.*, and accordingly that a bonus be declared and the directors be authorized to satisfy such bonus by the distribution of shares credited as fully paid up. Did this amount to a distribution of profits? I think not. The resolution did not give to any shareholder a right to sue for the dividend in cash, his only right being to have an allotment of fully-paid shares in the capital of the company. The profits remained in the hands of the company as capital, and the shareholder received a paper certificate as evidence of his interest in the additional capital so set aside. The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets; and the only result was that the company, which before the resolution could have distributed the profit by way of dividend or carried it temporarily to reserve, came thenceforth under an obligation to retain it permanently as capital. It is true that the shareholder could sell his bonus shares, but in that case he would be realizing a capital asset producing income, and the proceeds would not be income in

his hands. It appears to me that if the substance and not the form of the transaction is looked to, the declaration of a bonus was as Rowlatt J. said "bare machinery" for capitalizing profits, and there was no distribution of profits to the shareholders. I think, therefore, that neither the shares nor their face value should be treated as income of the respondent. The same observations apply to the resolution of 1916. Some time was occupied in the discussion of the question, whether in paying income tax on its profits the company acted as agent for its shareholders, and some cases were cited where this expression had been used. Probably the word was intended only to express in an abbreviated form the effect of s. 54 of the Income Tax Act, 1842. Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder. But no agency, properly so called, is involved.

With regard to the authorities, *Bouch* v. *Sproule* (1) appears to me to be directly in point. It is true that the actual decision related to the rights inter se of a tenant for life and remainderman under a will; but for the purpose of deciding that question it was necessary to determine whether a transaction such as is here in question was or was not a distribution of income. The conclusion of the House is expressed in the statement of Lord Herschell that "the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly created shares," and in his further statement that "the company did not pay, or intend to pay, any sum as dividend but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern." I think it right to add that if in the present case (as in *Bouch*

(1) 12 App. Cas. 385, 399.

H. L. (E.) 1921 — INLAND REVENUE COMMISSIONERS v. BLOTT. INLAND REVENUE COMMISSIONERS v. GREENWOOD. — Viscount Cave.

v. *Sproule* (1)) an option had been given to the shareholders to take or refuse the bonus shares, different considerations would have arisen; and I desire to reserve my judgment as to the effect of such an option upon the liability to tax. In *Swan Brewery Co.* v. *The King* (2) it was held that transactions similar to those now in question were, in effect, a declaration of a dividend within the meaning of the Dividend Duties Act, 1902, of Western Australia, and accordingly that duty was payable under that Act. The decision in that case is no doubt fully supported by the definition clause in the Western Australia Act; but if it were not for the definition clause the decision would, I think, be inconsistent with the decision in *Bouch* v. *Sproule* (1). In an American case of *Eisner* v. *Macomber* (3) a similar question arose for the decision of the Supreme Court of the United States. The question there was, whether Congress had power under the 16th Amendment to the Constitution to tax as income of the stockholder and without apportionment among the States a stock dividend made in good faith by a corporation; and the question was decided by a majority of the Court in the negative. The law there in question, no doubt, differs from ours; but the luminous reasoning of Pitney J. in that case is relevant to the question now under consideration, and compels my assent.

For the above reasons, I am of opinion that the order made by Rowlatt J., and affirmed by the Court of Appeal, was right, and that this appeal should be dismissed.

In *Greenwood's Case* your Lordships were informed that the facts of that case were not distinguishable in any material respect from those in *Blott's Case*, and I think that the result should be the same.

LORD DUNEDIN (read by LORD SUMNER). My Lords, I have found it difficult to come to a conclusion on this case. As the majority of your Lordships have determined that the appeal should be dismissed, it would be easy for me to

(1) 12 App. Cas. 385, 399. (2) [1914] A. C. 231.
(3) 252 U. S. 189.

acquiesce in that result and say no more, but I have not thought it right to refrain from expressing an opinion, as to the soundness of which I must not, after what your Lordships have said, be confident, but which represents the view which, on the best consideration I could give to the subject, I had formed.

I may say at once that I do not feel that the case is concluded by a decision. *Swan Brewery Co.* v. *The King* (1) was a decision upon an Australian statute in the words of which if anything became "an advantage" it would fall within the tax. *Bouch* v. *Sproule* (2) was a decision whether, according to the expressed wishes of the testator, certain shares in a company were to be handed over in their entirety to the tenant for life or were to be held for the remainderman, the produce thereof only going to the tenant for life. Whether the dicta in these cases afford material to settle this is another matter to which I shall refer hereafter. My Lords, the way the question presents itself to my mind is this: The company accumulate a large sum of profits on which they duly pay income tax. What could they do with it? They might have done nothing, in which case the money would just have remained part of the assets of the company. The expression "floating capital" is rather a convenient form of description than a legal definition of the nature of the fund. It might have paid it to its shareholders as dividends, in which case it is obvious that the recipient shareholder, if his income was above the minimum figure, would have had to include the dividend in his specification of his income for super-tax. Lastly, however, it is said the company might and did "capitalize" its profits. I confess I am shy of the word "capitalize." It seems to me to leave one in a hazy state of mind as to what is the legal operation which is so described. Undoubtedly it is to add something to capital. Now how can a company add to its capital? It has an authorized capital. There are certain ways in which authorized capital may be increased, but assuming the company has not taken advantage of what it can do in this way it can

(1) [1914] A. C. 231. (2) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Lord Dunedin.

only issue shares to the extent to which it still has shares authorized but not issued. If, however, it does so it cannot issue the shares for nothing. They must be paid for in money or under certain conditions in money's worth. Further, it cannot itself provide the money to pay for the new shares. If it did so it would do what is equivalent to buying its own shares, and that it cannot do: *Trevor* v. *Whitworth*. (1) It must therefore get the money from some one else. It may get it from the public or it may say to its shareholders: "We will give you the option of subscribing before we apply to the public," and when I say "it may," I always mean the same thing—namely, that the company can do and must do what the majority of the shareholders decide it shall do. In the present case the company did neither of these things, but it did a thing which it was in its power to do. It may say, and it did say to the shareholders: "There is a large sum of undivided profits. We shall allot to each shareholder his proportional amount of these profits, but we will not pay that amount in cash, but will impute it to the payment of the shares we are issuing, and give each shareholder the shares for which his allotted amount effectuated payment." I cannot myself escape from the feeling that that is just giving to the shareholder his share of the undivided profits, not in cash but in the shape of paid-up shares, and if that is so it seems to me to fall within the description of taxable income. Let me by way of illustration put the following possibilities. Undivided profits distributed as dividend in cash—there is no question. Next, suppose that profits are in the shape of some chattels, and that the chattels are distributed; here, again, it is conceded in argument that these chattels would be income. Next, let me suppose that a company had power to acquire shares of another company, that it has used its profits to buy such shares and distributed these shares to its own shareholders. There, again, would be something which was the equivalent of profit, though viewed in the light of the other company's affairs it would be capital. The last step is to do what was done here, to

(1) 12 App. Cas. 409.

use its own profits to pay up the shares which it then gave to its shareholders. I fail to see any difference in this position.

I am, however, of necessity compelled to consider the case of *Bouch* v. *Sproule*. (1) As I have already said I do not think the decision rules the matter. It remains to see whether the dicta of Lords Herschell and Watson do so. It is evident that their Lordships had no such case as the present before their minds. Super-tax did not at that time exist. I am of opinion that the judgment in *Bouch* v. *Sproule* (1) can be considered as based on propositions which have no application to the present case. The legal title to all the property in that case was in trustees. Shares in the company, representing the capital of the company, and dividends declared in respect of these shares alike fell within that legal title. But the beneficial title was, by the provisions of the testator's will, shared between two persons. One took the life interest, the other the remainder. The testator knew that his shares and all interests flowing from the possession of those shares were subject to be affected by such powers as the company lawfully possessed. If, therefore, the company decided that profits, instead of being divided and paid as dividend, should be used for the purpose of increasing the capital account, and that that increase should be divided among the shareholders, the testator might well be content that the decision of the company should affect the rights inter se of his beneficiaries. If the company settled that the profits were to be added to capital then they would form part of the corpus which must remain intact for the remainderman when his time of enjoyment emerged. If the profits were paid over as dividend then the tenant for life would receive that dividend. That does not, however, so far as I can see, settle that for the proper interpretation of a taxing act the profits because added to the capital of the company are to lose their nature as profits; and I think that the expressions used by the noble and learned Lords must be taken secundum subjectam materiem, and not given

(1) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Lord Dunedin.

such a universal application as to meet a case which was far from their thoughts.

In conclusion, I would only add that I have in this opinion of set purpose refrained from relying on the dictum of Lord Sumner delivering the judgment of the Judicial Committee of the Privy Council in the Australian case, not because I in any way disagree with it, but because I recognize that if it is in conflict with the necessary grounds of decision in *Bouch* v. *Sproule*, then as I am sitting in the House I should be bound to follow the latter-mentioned case. I think the appeal should be allowed.

LORD SUMNER. My Lords, I hope I may be excused for repeating what seem to me the essential facts. Briefly they are these. In 1915, Hepburn, Gale, and Ross, Ld., made 48,851*l.* on a paid-up capital of 163,140*l.* When the time came round for holding the annual meeting to declare dividends and for other purposes, the directors proposed a dividend of 10 per cent. on the ordinary shares, and, on the ground that "while the company has heavy commitments, which call for all its available capital, it would be unwise to make any exceptional distribution," they also proposed "to declare a further dividend to the ordinary shareholders, to be satisfied by the allotment of one Second Preference Share fully paid for every three ordinary shares held by them." It is a mistake to suppose that the directors' reason for not paying a larger dividend in cash was their desire to carry on a larger and more profitable business in the future by means of an addition of 33,000*l.* to their trading resources. They gave no such reason. They said, and very prudently too in view of rising prices and the precarious duration of the war, that they wished to keep in hand this part of the year's profits owing to their commitments, that is in order to pay possible liabilities. They had to satisfy the shareholders, yet they shrank from dissipating their reserves. Provided these two ends were attained all their objects were secured. Why should they desire to distribute 10 per cent. in cash, which was to be income in the shareholders' hands, and something more which was not to be income in their hands?

What could it matter either way, except in the case of persons liable to super-tax? Income tax had been paid on the company's profits already and it was not proposed to deduct anything in respect of it from the dividend. For all we know Mr. Blott may have been the only shareholder liable to super-tax and there is not the slightest evidence that liability to super-tax was ever thought of by anybody. People who pay super-tax do not usually get much consideration from people who do not. Whether the money remained in the company's hands throughout or went out to the shareholders as dividends paid and returned to the company as payment of calls on shares, made no difference to the company, and if it attracted super-tax to Mr. Blott en route, the result to everybody else was just the same. So far as the argument in this case is rested on an intention of anybody concerned to avoid super-tax, that intention is, in my view, a mere assumption; so far as it assumes that the Board or the company preferred to create bonus shares, fully paid, without any payment of a dividend beyond 10 per cent., to creating them by means of a payment of the amount due upon them and a repayment in account, it equally begs the question. The one thing that is, however, quite clear is that nobody, directors or shareholders or Mr. Blott, ever intended or supposed that the allottees were to be liable to pay calls on the newly issued shares out of their own property, so as to provide the company with new money. It must also be presumed that all concerned meant to comply with the law. I think the real crux of this case is to discover what was involved in carrying out the plan and yet complying with the law; to see what was done and not be guided by the name which the company chose to use. To call it "capitalization" is neither here nor there, for, apart from the Companies Acts, profits may be capitalized in more ways than one. What has to be asked and answered in this case is how could they be "capitalized" in accordance with those Acts, without either leaving the holder of the new shares liable to pay them up with new money or sharing out the profits to the allottees, whether in cash or in account, so that the share-out of the

H. L. (E.) 1921 — INLAND REVENUE COMMISSIONERS v. BLOTT. — INLAND REVENUE COMMISSIONERS v. GREENWOOD. — Lord Sumner.

money should be used to pay up the shares. To my mind there was either a payment to the shareholder of the nominal amount of the shares or the company paid up the shares itself and gave them away for nothing. It is a question of English Company law and no decision on the statutes or the constitution of the United States of America can throw any light upon it. In accordance with the Board's proposals, 33,333*l.* of the realized profits would be absorbed over and above the amount of the 10 per cent. dividend, and the carry-over would still be larger than the sum brought forward from the previous year by more than 2,000*l.* Nothing turns on this, however, for, by art. 128, the directors had power to set aside profits to a reserve fund, applicable, among other purposes, to the equalization of dividends or to a distribution in case of losses, and whether or not the surplus of the previous year was deemed to have been carried to reserve and then applied in the way proposed, enough had been made in the year in question for the purposes suggested. The shareholders adopted the directors' proposal and a resolution was passed "That it is desirable to capitalise the sum of 33,333*l.* 6*s.* 8*d.* being part of the undivided profits of the company and accordingly that a bonus at the rate of $33\frac{1}{3}$ per cent. per share, free of income tax, on each of the issued ordinary shares of the company be and the same is hereby declared, and that the directors be and they are hereby authorised to satisfy such bonus by the distribution among the members holding ordinary shares rateably of 33,316*l.* of the unissued second preference shares of 1*l.* each in the company credited as fully paid in satisfaction of such bonus."

Two quite distinct matters are dealt with in this resolution, the declaration of a "bonus," and the manner in which the bonus is to be satisfied. I cannot see that including two separate things in one resolution, neither being expressed to be in any way dependent on the other, can prevent each by itself from having in full whatever legal or practical consequence attaches to it as such. They are in the same position and have the same effect as if they had been separately expressed in two distinct resolutions. The first would be

an ordinary declaration of a dividend, and a very handsome one too, unless there is some magic in dividing money under the term " bonus " without the use of the word " dividend " ; the second is either a resolution to issue and give away shares for nothing, or it recognizes a right in the shareholder to a distribution or division in cash, which is to be satisfied without cash passing, and must also satisfy what the law requires, that is some consideration moving to the company for the issue and allotment of the shares. It is reasonably plain that this carefully worded resolution was intended to be, and was, an exercise of the powers given by arts. 125 and 127 as follows :—

" 125. No dividend or bonus shall be payable except out of profits arising out of the business of the company.

" 127. Any general meeting declaring a dividend may direct payment of such dividend wholly or in part by the distribution of specific assets and in particular of paid-up shares of the company. . . . . Where requisite, a proper contract shall be filed in accordance with section 88 of the Companies (Consolidation) Act, 1908. . . . ."

In effect a contract was so filed, by which it was agreed between the company and a shareholder, duly nominated to contract " on behalf of himself and all others the holders of ordinary shares in the capital of the company and as trustee for them," that the company should allot and issue second preference shares in accordance with the resolution, to be considered as fully paid up, and that the shares so divided " shall be accepted in satisfaction of the said bonus." The result was that a " bonus " at the rate of 33⅓ per cent. per share free of income tax was duly declared, and that the consideration of this contract for the issue by the company to the shareholder of its own shares, fully paid, was that the shareholders severally agreed by their agent and trustee, by way of accord and satisfaction, to take shares at the rate of 33⅓ per cent. per share, instead of the money to which they would otherwise have been entitled. As the article stood there was no other way in which the company could distribute paid-up shares of the company than in payment

H. L. (E.) 1921

INLAND REVENUE COMMISSIONERS v. BLOTT.

INLAND REVENUE COMMISSIONERS v. GREENWOOD.

Lord Sumner.

of a dividend, duly declared out of profits, and this is what the resolution purported to do.

My Lords, I do not think that anything which took place in the following year, 1916, is sufficiently different from the facts above stated to make any separate examination of it necessary, nor is the circumstance important that the shares issued were preference and not ordinary shares. I do not, however, wish to confine my opinion to the bare terms of the resolution and contract of 1915, or of the articles then existing. The result would be the same, to my mind, if there had been no contract at all and if the resolution had contained no language of special significance, and if the articles under which the company acted had included the article subsequently adopted, namely 127A, which enabled the company to authorize the directors to capitalize any profits, and to allot to the members holding ordinary shares of the company, in respect of the net amount capitalized, fully-paid shares of the company of equivalent nominal amount. In either case the nature of the operation performed seems to me in itself to involve the conclusion that one of its details is the declaration and payment of a dividend. My Lords, what has to be considered is what the company was trying to do and what was involved under the Companies Acts in doing it. The word "bonus" suggests, as was the fact, that the shareholders were getting a windfall for the year, which might not recur in another year, but the term "Stock Dividend," which is common in the United States, might just as well have been used. All, I take it, that is meant by the word "capitalize" is that when the operation authorized by the resolution has been completed, the result will be that the issued statutory capital will have been increased, and the calls due on the increase will have been paid up to an amount equal to the decrease in the reserve fund accumulated from profits previously undistributed. To the intermediate steps involved in producing this result the word in itself has nothing to say. It is quite true that where the directors recommended a "further dividend," to be satisfied by an allotment of shares, the resolution declared a "bonus," but I do not

apprehend that a company can affect the taxing rights of the Crown against a shareholder by the particular name that it chooses to attach to its proceedings. Bonus or dividend (and neither word has any statutory definition), call it which you will, there was a distribution at a rate per cent. on the nominal amount of each share, which distribution was deemed to be capable of suffering deduction for tax, for it was declared free of income tax, and this distribution was something to be satisfied in the particular way specified, which implies that otherwise it would have been satisfied by payment of money at the rate declared.

I think that insufficient attention has been paid to the scheme of the Companies Acts as interpreted in decisions, none of which, as I understood, was disputed in argument: *Ooregum Gold Mining Co. of India* v. *Roper* (1); *In re Eddystone Marine Insurance Co.* (2); *In re Wragg.* (3) It makes no difference whether the capital in question is part of the capital with which the company was originally constituted when first it started business or is capital subsequently created: per Lord Macnaghten, in *Ooregum Gold Mining Co. of India* v. *Roper.* (4) It is not a question merely of the time, whether before or after the issue of the shares, for registering a contract for satisfying liability for calls on the shares otherwise than by payment in cash in full, or of the penalty which follows on disregard of due registration. It is not a question of the mode, if any, in which a shareholder could question the action of the company in legal proceedings, but of the defence, which the taker of the shares would have had to any proceedings for payment of contributions or calls. It is a question of the statutory conditions, under which alone a company can act, when it issues shares. Not only is the validity of what is done dependent on compliance with the statutory conditions, as interpreted and reduced to principle in the decided cases, but, when something has been done in fact, it is to be presumed, till the contrary is shown, that it has been so done as

(1) [1892] A. C. 125, 136, 144.
(2) [1893] 3 Ch. 9.
(3) [1897] 1 Ch. 796.
(4) [1892] A. C. 144.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Lord Sumner.

to satisfy those conditions and to accord with those principles, and, however compressed the business steps adopted, and however short the cuts taken, they must be given such effect for legal purposes as to represent something that satisfies, instead of disregarding, the law. What is it that happens in law and in business, when a company, instead of distributing its reserves of undistributed profit, issues shares to a like amount fully paid or credited as fully paid? If language has any accurate meaning, which in company matters is not always the case, some one has to pay the company for these shares and some one has to be credited by the company with the payment. Now the money with which the payment is supposed to have been made in the present case was the company's money, and was and remained in the company's possession. The company could not pay itself with its own money. Physically, it never parted with a penny. I suppose that 33,333*l.* 6*s.* 8*d.* would be included in the first line of the balance sheet—namely, "to capital," which otherwise would have been included a few lines lower down in "Reserve Account," and that, in some account kept of payments made on the several shares, the shareholders, whether named or not, would have credit given them for payment in full, amounting in the aggregate to the same amount. Apart from what the law has to say to it, this merely records that the company has given away for nothing a number of full participant rights in its business, its assets and its income, and on the other hand has not given away any of the money, which would have otherwise have been available for distribution. No doubt the transaction results in the company having more statutory capital issued than before, and less accumulated and undistributed profit, but the present question is not one of the result but of the process by which the result is attained.

The scheme and the principle of the statute law on this subject are clear. It takes two to make a paid-up share. A share issued, whether it is part of the company's original issue of capital or is one issued on the occasion of surplus profit arising, is a share to be paid for; paid for by the allottee

in meal or in malt; in money, unless by contract between himself and the company he is enabled to satisfy his obligation to pay by some other consideration moving from himself to the company. Under the contract in question what consideration so moves from the shareholders? None that I can see, except the discharge of the company's debt for a dividend, which has become due to him by being declared. When debt for dividend is set off against debt for calls and the account is squared, the equivalent of payment of a dividend takes place. If the word "bonus" has some effect to the contrary, then no consideration has moved from the shareholder and his shares are not fully paid. The company can choose whether it will divide its profits in meal or in malt; if it decides to divide otherwise than in cash, a contract to accept something in lieu of cash operates nothing, for no right to cash has accrued. A contract to accept shares in satisfaction instead of cash implies, first, a declaration, which gives a right that has to be satisfied, and second, a satisfaction of that right, which is equivalent to payment. A shareholder's agreement, even though made by an agent duly authorized, that the company shall allot and issue certain shares credited or fully paid up has no validity in itself and adds nothing to what was resolved at the general meeting. His agreement that the shares are to be accepted "in satisfaction of the said bonus" either accepts, in lieu of something substantial, a benefit which is illusory—namely, a fully paid share which is not fully paid but has still to be paid for or otherwise lawfully satisfied, or else must accept it in a way which can satisfy the scheme of the statutes. The shareholder must remain liable to pay up the full amount of the share unless by a contract between himself and the company a consideration is given by him for the share, which will have the effect of payment by way of set off, accord and satisfaction, or otherwise.

My Lords, the classic way in practice of carrying out the perfectly well known operation which this company had in view is stated in Palmer's Company Precedents, 11th ed., Pt. I., p. 1062. Your Lordships were not informed that

H. L. (E.) 1921 — INLAND REVENUE COMMISSIONERS v. BLOTT. — INLAND REVENUE COMMISSIONERS v. GREENWOOD. — Lord Sumner.

there was any other known form, which is valid and in use, and I know of none. It is not necessary for present purposes to decide that no other mode of producing the desired result and yet complying with the law is feasible. It is enough to say that what was done should be referred to and is best explained by the standard practice on the subject, and that the rational and normal effect must be deemed to be such as will satisfy the principle of the Companies Acts. If that effect is attributed to what was done here, a dividend was paid to the respondent. It cannot matter for the purposes of the Revenue what he did with the money or money's worth distributed to him, or whether its disposal was the subject of prior agreement or not. Suppose Mr. Blott had had to sue the company to get these shares; is it to be said that his action would fail? If not, he would succeed by virtue of a legal right, founded on the company's resolution, to receive his portion of that which had become divisible among the shareholders. He would be entitled to have this brought into his hands by action. True, he would have to claim and take it in the form of newly issued capital stock, but it would come to him as dividend. If, peradventure, the company sued Mr. Blott for calls on his shares, what would his defence be? Why that, by payment or set-off, he had satisfied his liability. It would not be that the company had contracted not to ask for calls, for there is no consideration for any such contract, yet some defence he must have, for if he had none, everybody's intention would be defeated. If he had, it must be because dividends have been paid to him or to his use, for no other source of payment exists.

If I do not mistake, the contrary view is put shortly in three ways. The first is that it is a question of the form of the articles and of their being intra vires the memorandum, there being a power in a company, by a direct and simple process, to pay up its own shares in full and then give them away, so long as it only uses for this purpose profits already made, which as such are at its disposal to deal with as it pleases. It may be necessary, in view of s. 88, to declare a bonus and allot shares by agreement, but as Rowlatt J.

says this is "bare machinery; the fact is simply that the shareholders were given shares instead of a bonus." The second is that a shareholder gets no right in rem to the company's profits, unless he has a right of action to recover a dividend duly declared, and the tax is only attracted to what reaches his hands or might be brought into them by action, whether the company's action in not letting the dividend actually reach his hands is or is not in itself regular. The third that, on principle and by decision, a company can, as against all the world, the Inland Revenue included, decide whether to divide its profits as income or convert them into capital, and, on giving away the one or the other, decides conclusively whether what is given is capital or income. The principle is supposed to be derived from the Companies Acts, and the decision relied on is *Bouch* v. *Sproule* (1), a case that has, I think, never before been regarded as a revenue decision.

My Lords, I am not sure that these three ways of putting the matter are by any means identical or are even reconcilable. A company may choose not to divide profits among shareholders, but to use them, whether it makes them part of the wealth with which it trades or no longer trades with that wealth, but applies it to the creation of further paid-up statutory capital in such fashion as the law requires. When it decides this, why must it be assumed to decide anything more? Why should its decision bind utter strangers, for example, the Inland Revenue? There is no ground that I know of for saying that money is not paid to a shareholder unless the intention is that he may dispose of it just as he pleases, any more than there is for saying that money may not be duly paid by book entries but can only be paid in cash. There will be a payment even though by prearrangement there is a repayment immediately afterwards. Money, though it comes with a clog on it, is taxable, if and because it comes. How can mere nomenclature affect rights, which depend on what has to be done in order to satisfy the law? Could a company declare and pay a dividend in the ordinary

(1) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Lord Sumner.

way and yet, by first calling it "capital" and saying it was not "income," prevent the cash from being taxable as income in the shareholders' hands? Granting that the company is free to give a shareholder the money, with which to pay up his calls on shares newly issued to him, this is paying money to him or to his use, and to send him this money out of the year's profits along with his dividend warrant or to apply it to his use in the same way and at the same time is surely to put in his hands profit or gain, whether the company chooses to call it capital or nothing at all. Again, to say that the matter depends on the question whether or not the articles are intra vires, or that the intention of the resolution is dominant, and all the rest is "mere machinery" is, I say it humbly, to beg the question. How can articles authorize a company to disregard the scheme of the Acts, though they may enable a company to do collectively what otherwise must be agreed with the shareholders individually? To call the steps that might be relied on as satisfying that scheme "mere machinery" is to evade the difficulty. It is just as reasonable to call the shares allotted "mere machinery" for wrapping up a distribution of profit as to call bonus shares "mere machinery" for effecting a distribution of capital. "Looking at the substance and not at the form" is a good guide for judicial conduct, but what is substance? If a form has to be gone through in order to satisfy the law, for my part I should think it was pretty substantial. A final opinion on these questions need not, however, be expressed to-day. Whatever innate powers a company may have, the present question must depend on the legal effect of what it did, not on names given and objects or desires kept in view.

My Lords, apart from authority, my conclusion is that the company made this distribution of bonus shares to its shareholders, out of its annual profits or gains; that it adopted a machinery for doing so, which involved the payment of a dividend; that cross cheques, one for dividend and another for calls, were not exchanged because in business that would be a useless procedure, and the same result with the same

liabilities and incidents could be obtained by an obvious short cut; and that Mr. Blott, having in effect received a dividend, from which, if called upon to do so, he must have allowed a deduction for duty, previously paid by the company so as to fall as a burden on him, is bound to bring in this dividend as one of his sources of income for super-tax. Having arrived at this conclusion on the general law of statutory companies as now settled by decisions, I turn to the case of *Swan Brewery*. (1) I have re-examined the cases of the appellants and the respondents presented to the Privy Council and the record on that appeal, the report in the Court below (2), and the Companies Act of West Australia applicable to the case, that of 1893. I am quite clearly of opinion that what was said by the Judicial Committee, as to the effect in law and in business of a distribution of bonus shares, was part of the decision and cannot be distinguished from the present case. Of course it does not bind your Lordships, but I think it ought to be followed by all who do not feel themselves prepared to say that it was wrong and to say clearly why it was wrong. That case did not turn on the special definition of dividend in the taxing statute of West Australia. The argument, both in West Australia and on appeal, was, as it has been here, that the transaction was solely one of allotting shares; that it was indivisible, and that nothing equivalent to the payment of a dividend occurred. *Bouch* v. *Sproule* (3) was cited and was considered. The passage in question was an essential part of the decision. It is in point now and I adhere to it. My Lords, no authority has been cited to the contrary of the proposition laid down in the *Swan Brewery Case* (1), apart from *Bouch* v. *Sproule* (3), and, with all respect to the Court of Appeal, I do not think there is anything in the opinions there expressed which really touches the present case.

In *Bouch* v. *Sproule* (3), before any question arose or could arise between tenant for life and remainderman, shares had been issued upon a plan which had completely

(1) [1914] A. C. 231. (2) (1912) 14 W. A. L. R. 177.
(3) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Lord Sumner.

succeeded, for they were offered upon terms which only sheer carelessness or sheer folly could fail to accept. The offer was, of course, accepted by everybody, the trustee of the fund in question among the rest. I should think refusal would have been a breach of trust on his part, for his business was not to throw an obviously good thing away. It was only when all this had been done that any question could arise. Everybody approbated this issue of the shares and the way in which it had been made. Both the tenant for life and the remainderman claimed the benefit of it, and therefore affirmed it. Neither could be heard to say he would take the shares but repudiate the scheme. The only question was how the settlement operated in the events, which had happened, as between these beneficiaries.

In any literal sense of the word intention had nothing to do with the matter. The testator had none, for he never gave the question a thought; the trustee had none, for his duty was to leave the law to settle the incidence of the benefits. He had no right, by electing to take the shares, to benefit the tenant for life to the prejudice of the remaindermen. The directors and the shareholders were strangers to the settlement and heard and knew nothing about it; the company, in so far as intention is a mental act, was incapable of having any intention at all. The tenant for life and the remainderman had no intention except to get the most out of what had been done; in the doing of it they had and could have had no hand at all. The intention, which the final decision assumed, was one of those so-called intentions which the law imputes; it is the legal construction put on something done in fact. The testator had disposed of shares with regard to which the company could take a certain course. He was not affected by the Companies Acts but could determine for himself what should be capital and what income to the objects of his bounty or could leave it to be determined by others, including the company, just as he chose. The law deemed him to intend his disposition to apply according to whatever course in fact was taken, and by means of this assumption of his intention an effect was given to his

disposition, which was consistent with the fact that the parties derived their rights solely from his bounty, although in circumstances in which, as a matter of fact, he had made no conscious disposition at all.

My Lords, needless to say, I fully accept everything laid down in *Bouch* v. *Sproule* (1) unreservedly, but I think it is only indirectly a decision upon the power of companies to capitalize undistributed profits and, as regards the steps by which this is or is deemed to be done, it is not a decision at all. Doubtless a company can capitalize its own undistributed profits, and can, by taking the appropriate steps, turn them into new fully paid shares and no corporator can say it nay, still less can persons who only claim through and under a corporator. The question here is what is further involved in such action on the company's part, but *Bouch* v. *Sproule* (1) only decides the effect as between a tenant for life and a remainderman of a valid capitalization and issue of shares and tests it by the design carried out and accomplished by the company, by whatever intermediate steps this may have been done. What I wish to point out is that the machinery by which the issue of shares was effected, never came in question at all nor did any question of taxation. Super-tax was unthought of; the company had paid its income tax and need not deduct if it did not choose. No rights of third parties arose and the issue of shares was doubly a domestic matter, for it not only turned on the construction to be placed on the status of these shares, as fixed by the company for its corporators, but further the dispute arose only between beneficiaries, the aggregate of whose separate interests made up the total interest in each share held by the trustee. However it was decided, the Crown lay outside the circle of corporators. Its right to tax was a wholly external matter, and never was brought before the House at all. There is then nothing in the reasoning required for the solution of that problem which touches the present question—namely, whether or not the machinery by which an issue of bonus shares is effected does or does not

(1) 12 App. Cas. 385.

H. L. (E.)
1921
INLAND REVENUE COMMISSIONERS v. BLOTT.
INLAND REVENUE COMMISSIONERS v. GREENWOOD.
Lord Sumner.

involve payment of a profit or gain to the actual shareholder who is taxed, within the meaning of the Income Tax Acts, and, as one would expect, very few words are to be found in the case which can be said to bear on the present matter at all. The whole weight of *Bouch* v. *Sproule* (1) for present purposes rests on the passage at the end of Lord Herschell's opinion where he says (2): "the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern."

My Lords, if Lord Herschell meant to say, as surely he did not, that no dividend had been paid, it was not true. A dividend warrant had been sent out, in the form of a negotiable instrument, which, had it been presented for payment, must have been paid in cash. The obligation to do so was only satisfied because the shareholder did not choose to cash his warrant, but applied it by agreement in another way. Lord Herschell looked at the whole plan and not merely at one step in it. What he meant was something highly germane to the issue—namely, that the plan, which the company carried out, was not a mere plan for paying the usual dividend in a novel form, but was a more far-reaching design to bring about an increase in statutory capital without physically parting with cash. Such a design has a legal effect on those whose rights only arise on the footing that the design has been accepted and affirmed; it has none on the officers of the revenue, whose rights are statutory and independent, and intervene before the point is reached, at which the interests of parties like those in *Bouch* v. *Sproule* (1) become concerned. It cannot be that, if what is done falls within the statutory charge, a meeting of shareholders can prevent the charge from attaching by agreeing within its own doors on the use to which the members severally will put their money. Of the four noble Lords, who took part in the decision, two, Lords Bramwell and Fitzgerald, say nothing about payment of a dividend whatever, while Lord Watson says (3) that payment for the amount due on the share was

(1) 12 App. Cas. 385. (2) Ibid. 399. (3) Ibid. 404.

imputed in the company's books, in other words that when the trustee accepted the offer of shares and sent back his dividend warrant to pay them up with, the company so entered the transaction and gave him credit in its books for his payment. I am therefore of opinion that the actual decision and the principle of *Bouch* v. *Sproule* (1) are limited to the case in hand and do not affect the present appeal, and that, alike in principle and on the authority (if I may call it so) of the *Swan Brewery Case* (2), there was a payment here, which clearly was to Mr. Blott an income payment. Accordingly he is liable and the appeal should be allowed.

COMMISSIONERS OF INLAND REVENUE *v.* BLOTT.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 3, 1921.

Solicitor for the appellants: *Solicitor of Inland Revenue.*
Solicitors for the respondent: *Macdonald & Stacey.*

COMMISSIONERS OF INLAND REVENUE *v.* GREENWOOD.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 3, 1921.

Solicitor for the appellants: *Solicitor of Inland Revenue.*
Solicitors for the respondent: *Norton, Rose & Co.*

(1) 12 App. Cas. 385. (2) [1914] A. C. 231.

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *June* 3.

BROWN . . . . . APPELLANT;

AND

NATIONAL PROVIDENT INSTITUTION RESPONDENTS.

ET E CONTRA.

OGSTON . . . . . APPELLANT;

AND

PROVIDENT MUTUAL LIFE ASSOCIATION . . . . . RESPONDENTS.

ET E CONTRA.

Revenue—Income Tax—"Profits on discounts"—Transactions in Treasury Bills—Chargeability of Profits of previous Year upon Cessation of Profits in Year of Charge—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, Case* 3, *rr.* 1 *and* 2.

The Third Case of Sch. D of s. 100 of the Income Tax Act, 1842, comprises "the duty to be charged in respect of profits of an uncertain value not charged in Sch. A," and by the first rule of that case "the duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year." By the second rule "the profits . . . . on all discounts . . . . shall be charged according to the preceding rule in this case":—

Held, (1.) that transactions in Treasury Bills were transactions in discounts within the meaning of the second rule of the Third Case of Sch. D and were liable to income tax in respect of the profits arising therefrom; (2.) that the whole of the difference between the amount paid for a Treasury Bill and the amount received on sale or maturity was a profit on a discount and must be taken into computation; (3.) by Viscount Haldane, Lord Atkinson and Lord Sumner, Viscount Cave dissenting, that where no profits had been derived from transactions in Treasury Bills in the year of assessment the taxpayer was not assessable to income tax by reason of the fact that he had made a profit in Treasury Bill transactions in the preceding year, inasmuch as the principle of assessment laid down in the first rule of the Third Case assumed as a requisite of chargeability the continued existence of the same source of profits in the year of charge.

Decision of the Court of Appeal [1920] 3 K. B. 35 affirmed on points 1 and 3 but varied on point 2.

APPEALS and CROSS-APPEALS from a decision of the Court of Appeal (1) varying a decision of Rowlatt J. (2) in both cases.

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD ATKINSON, and LORD SUMNER.

(1) [1920] 3 K. B. 35. (2) [1919] 2 K. B. 497.

The questions raised by these appeals and cross-appeals were substantially the same in both cases and related to the liability of an insurance company to be assessed to income tax under rr. 1 and 2 of the Third Case of Sch. D of s. 100 of the Income Tax Act, 1842, in respect of its investments in Treasury Bills.

BROWN'S CASE.

The facts may be shortly summarised as follows :—

In the year ending April 5, 1916, the respondents bought Treasury Bills maturing at three, six, and nine months at a discount. Some of these bills they sold during their currency and others they held until maturity.

In the year ending April 5, 1917, they bought some more Treasury Bills, which they held without selling, but before the end of that financial year the bills were converted into 5 per cent. War Loan on terms under which each bill was credited to the respondents as investors in the War Loan at a figure representing the amount of the bill less a discount of 5 per cent.

In the year ending April 5, 1918, the respondents had no transactions in Treasury Bills.

In respect of these transactions the amounts received by the respondents exceeded the amounts paid by them, in the year ending April 5, 1916, by 5422*l.* odd, and, in the year ending April 5, 1917, by 19,714*l.* odd, to which was added an item of approximately 852*l.*, being the difference between interest paid and received on short loans to and from bankers, thus making a total of 20,566*l.* for that year. No question arose as to the short loans.

For each of the years ending April, 1917, and April 5, 1918, the respondents were assessed to income tax under the Third Case of Sch. D in respect of the excess of receipts over payments arising on these transactions in the preceding year.

On appeal, the Special Commissioners were of opinion: (1.) That the transactions in Treasury Bills were transactions in discounts; (2.) that the whole of the differences between the amounts paid and the amounts received for Treasury Bills were profits on discounts; (3.) that the profits from

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION.

discount transactions were not chargeable to income tax unless the source from which they arose continued to exist in the year of charge. They accordingly confirmed the assessment for the year ending April 5, 1917, but altered the assessment for the year ending April 5, 1918, by excluding from it all sums representing profits from transactions in Treasury Bills for the year ending April 5, 1917, and they stated a case for the opinion of the Court.

Rowlatt J. agreed with the Commissioners on points 1 and 2, but differed from them on point 3, and was of opinion that as regards profits comprised in the Third Case the Legislature had regarded the taxpayer himself as the only source of profit which need exist in the year of assessment, and had taxed him upon any profits in respect of discount transactions which he might have made in the preceding year.

The Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.) agreed with Rowlatt J. upon point 1. Upon point 2 the majority (Warrington L.J. dissenting), differing from Rowlatt J., held that when a bill was sold before maturity a part of the profit should be deducted as representing an accretion of capital, and they accordingly remitted the case to the Commissioners on this point. Upon point 3 the Court unanimously reversed the decision of Rowlatt J. and held that profits on discounts could only be charged under the Third Case in Sch. D in a year when the source of such profits still continued to exist.

The Surveyor of Taxes appealed against this order so far as it reversed the order of Rowlatt J. and there was a cross-appeal by the respondent company so far as it affirmed the order of the learned judge.

1921. Feb. 24, 25, 28; March 1, 3. *Sir Ernest Pollock S.-G.* and *Reginald Hills* (*Sir Gordon Hewart A.-G.* with them) for the appellant.

1. On the question whether transactions in Treasury Bills are transactions in discounts and whether the profits on such transactions are profits on discounts the Courts below were in favour of the appellant.

[They referred to *In re Land Securities Co.* (1)]

2. On the question how these profits are to be computed it is submitted that the whole of the difference between the amount expended in purchasing and the amount received on the realization of a Treasury Bill is a profit on a discount within the meaning of the second rule of the Third Case of Sch. D. The majority of the Court of Appeal were of opinion that some part of this profit ought to be eliminated as representing an accretion of capital, but no question of capital accretion arises here. This difference is a profit on a discount as ordinarily understood and is taxable under the Act of 1842. It is the remuneration which the buyer of a Treasury Bill gets for his money. There is no ground for any inquiry on the basis of the fluctuation in the rate of interest.

[They referred to *Alianza Co.* v. *Bell.* (2)]

3. On the question whether the profits of one year arising from these discount transactions can be taxed in another year, profits on discounts are expressly made subject to tax in the year following that in which they accrue by the first rule of the Third Case of Sch. D and the non-existence of the source of such profits in the year of charge does not affect the chargeability of the profits of the preceding year. Rowlatt J. was right in saying that as regards profits falling within the Third Case no continuance of the same source of income is required. Upon the taxpayer's contention the profits of the first year would escape taxation, although no other case can be found in the Act where that occurs. In the First, Second, Fourth and Fifth Cases of Sch. D the source of the profit is indicated, but in the Third Case it is not, and the reason is that the Legislature is dealing with a special class of profits—namely, intermittent profits of uncertain value. By the first and second rules of the Third Case the tax on profits on discounts is to be computed and charged on the basis of the profits arising within the preceding year. If it is said that only profits for the charging year are to be considered that is in effect to repeal the Third Case. The

(1) [1896] 2 Ch. 320. (2) [1905] 1 K. B. 184; [1906] A. C. 18.

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION.

Legislature says that profits on discounts shall be charged and that the profits of the preceding year shall be the measure and the ground of liability. The Act nowhere says that there must be a continuing source of profit or that these profits, to be charged, must be profits in the year of charge. The effect of the heading and rr. 1 and 2 of the Third Case is that the Legislature designates profits on discounts arising in one year as chargeable in the next. The difference in the mode of treatment by the Legislature of this class of profits is due to the exceptional character of the profits. In the case of super-tax, which is computed in the same manner, it has been held to be immaterial that the source of income should continue in the year of assessment: *Fitzgerald* v. *Inland Revenue Commissioners.* (1) That case applies by analogy.

[They also referred to *Partington* v. *Attorney-General* (2) as to the construction of taxing statutes, and to *Liverpool and London and Globe Insurance Co.* v. *Bennett* (3) as to the option of the Crown to tax insurance companies on the produce of their investments.]

Sir John Simon K.C. and *Sir William Finlay K.C.* (with them *A. M. Bremner*) for the respondents.

As to the question whether the tax on profits on discounts can be imposed where there is no continuing source of income, the tax imposed by the Income Tax Act of 1842 is one tax and is a tax on the income of the taxpayer in the charging period, and, although the Act contains five schedules, those schedules are merely different ways of taxing profits in the year of charge as provided by the Act. Case 3 is only one of the cases under Sch. D and the genus in Sch. D, like the genera in the other schedules, is found to be profit in the year of charge. Rules 1 and 2 of the Third Case cannot go outside the area of the tax itself, which is defined at the commencement of the schedule, and the reference to the previous year in Case 3, as in the other Cases in which the question is to be arrived at by a reference to past years, is

(1) [1919] 2 K. B. 154. (2) (1869) L. R. 4 H. L. 100, 122.
(3) [1912] 2 K. B. 41.

measure only. The fact that the Income Tax Act of 1842 leaves a lacuna by which in certain events certain property may escape taxation is not a reason for straining the Act so as to catch that property. If the Act provides a scheme by which a man's property in the year of charge is taxed by reference to past years it follows that the Revenue will lose the tax on the income of the first year. The way to meet that is to make an express provision by slightly different machinery to secure the tax on the income of that year. That danger has been provided against by the Act in the First and Second Cases, but the Third Case contains no similar provision, and accordingly the income for the first year escapes taxation. Suppose in the year of charge the taxpayer has transactions in discounts, but only to a small extent; then under s. 133 he would be granted relief. But suppose the source has ceased altogether, can it be said that the taxpayer is to pay on the previous year without any deduction at all? There is no justification for saying that any of the Cases in Sch. D can warrant the revenue in charging the taxpayer with income tax where the source has ceased.

As to the cross-appeal: profits on the purchase and sale of Treasury Bills are not profits on discounts within the meaning of Case 3. The language of r. 2 was not intended to cover investments in this particular form of Government security, but relates to ordinary discount business.

[They referred to *London County Council* v. *Attorney-General* (1) as to the history of income tax legislation.]

Sir Ernest Pollock S.-G. replied.

The House took time for consideration.

OGSTON'S CASE.

The facts in this case did not differ materially from the facts in *Brown's Case*.

1921. March 3 and 4. *Sir Ernest Pollock S.-G.* and *Reginald Hills* (*Sir Gordon Hewart A.-G.* with them) for the appellant.

(1) [1901] A. C. 26, 37, 38.

H. L. (E.) 1921 — BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. —

Sir John Simon K.C. and *Sir William Finlay K.C.* (with them *A. M. Bremner*) for the respondents.

The House took time for consideration.

1921. June 3. VISCOUNT HALDANE. My Lords, the appeal and the cross-appeal raise questions of importance as to the scope of the income tax. The circumstances which give rise to these questions are, briefly stated, as follows. In each of the financial years ending April 5, 1916, and April 5, 1917, which I will call the years 1915–16 and 1916–17, the respondent Institution bought at the Bank of England Treasury Bills, maturing for payment after intervals of three, six, and nine months. These were bought at a rate of discount fixed by the Treasury. The bills bought in 1915–16 were, as to some of them, sold in 1916–17 during their currency, and as to others of them were held until they matured and were paid off. All the bills bought in 1916–17 were held without being sold, but before the end of 1916–17, early in 1917, and before April 5, they were converted into 5 per cent. War Loan, on terms under which each bill was credited to the Institution as investors in the War Loan at a figure representing the amount of the bill, less a discount of 5 per cent. At the end of the year 1917–18, the Institution did not hold any Treasury Bills, and had had no transactions in them in that year. In each of the years 1916–17 and 1917–18, the Institution received and paid interest on short bankers' loans, but we are asked from the Bar to assume that neither this circumstance nor the fact that they received interest on investments in War Loan affects the present question. In respect of their transactions in Treasury Bills the amounts received by or credited to the Institution exceeded the amounts paid by it for the bills by 5422*l.* 11*s.* 7*d.* in 1915–16 and by 20,566*l.* 8*s.* in 1916–17. The latter amount includes a small sum representing the difference between the amounts received and paid in respect of interest on bankers' loans. The Institution was not for any of the three years ending

in April, 1918, assessed to income tax on the balance of its profits and gains under Case 1 of Sch. D. For 1916–17 the first of the assessments now in question was made upon the basis of the differences between the amounts paid and the amounts received in respect of the Treasury Bills realized within the preceding year. For 1917–18 the second of the assessments was made upon the basis of the differences between the amounts paid and the amounts received in respect of Treasury Bills realized in 1916–17, together with the differences between the interest paid to and the interest received from bankers on short loans within 1916–17. As to this last item, as I have already mentioned, no question arises. The Institution did not dispute its liability to be assessed on the amount, and on the other hand it is by agreement to be looked on as a source of income wholly independent of that from which the profit on discounts arose.

My Lords, the Crown contends that the differences in controversy between the amounts paid and the amounts received in respect of the bills, whether obtained by waiting until maturity or on sale or conversion of the bills, were profits on discounts chargeable for income tax under the Third Case of Sch. D of the Income Tax Act. It alleges, further, that there is liability to the tax under that case, on the basis of the full amounts of the profits or gains arising from the sources to which the case extends received within the preceding year, whether any profits or gains do or do not arise within the year of actual assessment.. On the other hand it is argued for the Institution that in any event the assessment for the year ending in 1918 cannot be upheld, inasmuch as the Institution did not hold or have any transactions in Treasury Bills during that year. It is further said that, apart from this, the difference between the sum paid for a Treasury Bill and the sum received on sale on maturity is not an annual profit or gain, but an accretion to capital, and is not a profit on discount within the meaning of the language of the Third Case. My Lords, as to the year 1916–17, since there were transactions in the bills in that year, the only question which arises is whether the assessment for the year should be

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Viscount Haldane.

remitted to the Special Commissioners of Income Tax, who stated the case on which all the points are raised, to eliminate the amount of any accretion to capital in the amount received for a bill, due to such causes as the rise or fall in the value of money and the state of the money market, as distinguished from the difference in value by which the bill had increased by its mere advance towards maturity. The Special Commissioners thought that the whole of the transactions with the bills were transactions in discounts, and that the whole of the differences realized in these transactions were profits on discounts within the meaning of the Third Case. They therefore confirmed the assessment for 1916–17, but they altered that for 1917–18 by excluding from it all sums representing profits from such transactions in 1916–17. This they did on the ground that such profits did not come within the words of the case unless the source from which they arose—namely, discount transactions—had continued to exist in the year of charge, 1917–18. Since, as I have already stated, there were no such transactions in this year, they held that there could be no assessment of the sole kind which was attempted. As to the year 1917–18, this is the only question before the House. A third point was indeed at one stage in the proceedings made for the Crown, that the profits made in 1916–17 from other sources, such as the interest on bankers' loans or war loans, might count as a source continuing in 1917–18, and as satisfying, for the purposes of the assessment, the language of the Legislature. The Commissioners decided against the Crown on this point, and as the latter did not again raise it in the Courts below it is agreed that your Lordships have not to decide it.

My Lords, the questions raised by the case stated by the Commissioners came, in the first instance, before Rowlatt J., in the King's Bench Division. That learned judge dismissed the appeal of the Institution and allowed that of the Crown. He was of opinion that the difference between the amounts paid for the purchase of the bills and the amounts received on realization was profit on discount within the Third Case. He was further of opinion that the principle of taxation

under the first two rules of this case was to impose the tax on the taxpayer personally as a true source in the year of assessment, and to impose the tax in respect of whatever he had made under the heads in the two rules in the preceding year, whether there were any other source continuing, such, for example, as a business, or not. Upon these points the learned judge delivered an elaborate and closely reasoned judgment. The Court of Appeal, however, varied this decision materially. On the question, indeed, whether the transactions in Treasury Bills were, generally speaking, transactions in discounts, they unanimously dismissed the appeal and upheld the view of the Special Commissioners and Rowlatt J., that the profits therefrom, when truly computed, were chargeable as profits on discounts under the second rule of the Third Case of Sch. D of the Income Tax Acts. They held also that, in instances where the Institution had bought a bill from the Government and had held it till maturity, the whole of the accretion was rightly brought into computation as a profit on discount, being really on the balance of interest upon a sum lent. But by a majority, Warrington L.J. dissenting, the Court of Appeal held that the whole of the differences between the amount contracted for and the amount received for a bill which was sold or converted into War Loan during its currency, was not necessarily taxable as a profit on a discount. The difference did not necessarily represent only a profit by way of income, but might in part represent an accretion to capital. Such an accretion might be due to the state of the money market and the rise or fall in the value of money and the rates of interest thereon, by which the price of the Treasury Bill might have been caused to rise or fall without strict correspondence with its progress towards maturity. The only amount to be taxed as profit on a discount in such a case was therefore the amount by which its value had increased merely by reason of its advance towards maturity. The assessment was therefore ordered to be remitted to the Special Commissioners for adjustment by elimination of the elements of profit due to accretion of capital on this principle.

H. L. (E.)
1921
BROWN
v.
NATIONAL PROVIDENT INSTITUTION.
OGSTON
v.
PROVIDENT MUTUAL LIFE ASSOCIATION.
Viscount Haldane.

My Lords, on this last question I find myself unable to agree with the view of the Court of Appeal. I see no answer to the argument as stated by Warrington L.J. (1) It is concise, and I will adopt his words: "When a holder, whether the original purchaser or not, realizes during currency, he really receives a proportion of the total profit resulting from the fact that the bill was bought at a discount. It is true that that proportion may not bear an exact relation to the period of currency but may be determined by variations in the value of money, in the public credit and so forth. But it seems to me that the total of the profits received by the various sellers after deducting losses, if any, cannot exceed the difference between the price originally paid and the sum receivable at maturity, and that the considerations I have referred to merely affect the distribution of that difference between the various holders. Profits made by discounting bills seem to me to rest on the same footing, and conversion into War Loan also. This last is simply a sale on certain terms fixed by the Government and investment of the proceeds." My Lords, I do not think that this reasoning is really answerable. I agree, too, not only with Warrington L.J., but with the other members of the Court of Appeal, that the profits, whatever they are in this case, must be treated as profits of the year in which they were received.

The remaining question is one of considerable difficulty. It is that of the chargeability by assessment for the year 1917–18, in which there were no transactions in bills, of the transactions during the previous year. The Court of Appeal, differing from Rowlatt J., thought that profits on discounts could only be charged under the Third Case of Sch. D in a year when the source of such profits still continued to exist, and that in consequence the profits on discounts of a previous year escaped taxation under that case if in the succeeding year no such profits had been made. My Lords, this question, the most important in the appeal brought before us, can only, I think, be answered if the principle on which the income-tax legislation is based has been first defined,

(1) [1920] 3 K. B. 35, 55.

and to this principle I therefore turn. The case is governed, not by the general Income Tax Act of 1918, an Act which has superseded the older legislation, but by the Income Tax Act of 1853, and the provisions of the Act of 1842, which it kept alive. The Finance Acts of 1916, 1917, and 1918 rendered those the governing statutes for the purposes of the question before us. My Lords, in *London County Council* v. *Attorney-General* (1) it was decided by this House that the Income Tax Acts of 1842 and 1853, as modified by the Customs and Inland Revenue Act, 1882, do no more than impose a single tax on profits and gains brought into charge by the Income Tax Acts. There is no special or peculiar tax under each case of Sch. D and the other schedules or their branches, whatever be the idiosyncracies of the methods prescribed for collection. The expression "income tax," as used by the Legislature, was a generic description of the tax which was levied under all the schedules alike, and it was not meant to be anything but a tax on income. There was imposed under the schedules no collection of taxes distinct from each other, but simply one tax, with standards for assessment which varied according to the sources from which the taxable income was derived. Now the Act of 1853, as appears from its title and from s. 2, was an Act to impose an income tax on annual profits or gains arising from property or from some occupation.

My Lords, Sch. D of the Income Tax Act, 1853, includes as taxable profits the annual profits and gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere; and extends to "all interest of money, annuities, and other annual profits and gains not charged by any of the other schedules contained in this Act." By s. 5 the assessments are to be made under the regulations and provisions of the Income Tax Act of 1842. The Third Case of Sch. D in the latter Act is provided by s. 100. It enacts that the duty to be charged in respect of profits of an uncertain annual value not charged in Sch. A is to be as

(1) [1901] A. C. 26.

H. L. (E.) 1921 — BROWN v. NATIONAL PROVIDENT INSTITUTION. — OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. — Viscount Haldane.

follows: "First. The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ending as in the First Case, to be paid on the actual amount of such profits or gains, without any deduction: Second, The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Schedule (C)), and on all discounts and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this case." There is a third rule which provides for a charge for the tax upon the profits of dealers in cattle and milk, when the annual value of the land occupied does not afford a just indication of the profits made. In such a case a return of such profits may be required for assessment, to be measured for taxation on the retrospective principle laid down in the first rule of the same Case. My Lords, it was open to the Crown to have charged the Institution for income tax on the balance of its profits and gains under the first rule of the First Case of Sch. D. This course, for reasons that were probably sufficient, the Crown did not take. Sect. 102 of the Act of 1842 is the relevant charging section. It is obvious that its purpose is to impose the charge for tax upon everything that comes within Sch. D in such a way as to sweep in interest on money not reserved or charged or payable for the period of one year. It is clear that if the profits or gains in question come within the first and second rules of the Third Case they are thus charged. But the question is whether they do so come, for if not no other ground for charge has been alleged before us. It is, I think, for reasons already given, clear that the sums in question are "discounts" within the second rule. The point is whether the first rule charges them. They are no doubt profits of an uncertain annual value within the meaning of the general heading of the case. In the instance of the assessment for the year 1916–17 the Institution had the transactions I have referred to in Treasury Bills as well as other analogous transactions, in the preceding year,

1915–16. The operations in the bills were a source of "profits of an uncertain annual value," and these operations existed and yielded profit in the second year as well as in the first. Subject, therefore, to the other question as to the nature of the differences between the amounts paid and the amounts received in respect of the bills not being annual profits or gains at all, the question on which I have already expressed a view adverse to the contention of the Institution, it is plain that the Institution was properly assessed on such profits measured as in 1915–16. But as to the assessment for 1917–18 wholly different considerations arise. In that year there were no such transactions, and consequently continuity of sources between the two years did not exist. The question is whether under such circumstances the Institution can, under the words of r. 1, be charged in respect of the amount of the profit and gains which arose within the preceding year, or whether the source of such profits and gains must be one which continued to exist in the year of assessment. So that, whatever the principle of computation or measurement directed to be applied, what is assessable is only profit existing in the year of assessment. My Lords, the language of the rule measures the amount in respect of which the assessment is to be made by that of the profits and gains within the preceding year. But this does not appear to be conclusive. For the principle of retrospective measurement is one which is applied elsewhere in the Acts, limited, however, to cases in which the source of income continues to exist in the year of assessment. It is the profits and gains of a continuing business that are in such cases the subject of assessment, but the amount is measured by reference to preceding years. The first rule of Case 1 of Sch. D seems to me to be just an illustration of this principle. It is to be observed that, speaking broadly at all events, the general principle of the Acts is to make the tax apply only to a source of income existing in the year of assessment. In the instance of the Third Case itself the third rule of the three rules seems to conform to the principle, and, if the Crown is right in its construction of the second rule, the

H. L. (E.) 1921 — BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. — Viscount Haldane. —

provision therein contained is accordingly not only out of harmony with the other provisions made in the third rule of the Third Case, but differs from the scheme of the Acts as appearing elsewhere. The first rule of the Third Case, if it stood without any interpretation from the second rule, should, I think, be construed according to the general principle I have referred to.

My Lords, it is no doubt true, as Rowlatt J. pointed out, that the result of applying the general principle that continuation into the year of assessment is the foundation of the tax, coupled with that of retrospective measurement, will be that if there is only a very small amount of profit in the year of assessment the taxpayer may have to pay on a large amount received in the past. It is also true that if he can be assessed only on any profits made in the previous year standing alone, and there is no such previous year, inasmuch as he has only begun to earn profits in the year of assessment, he escapes duty. And yet, if he ceases to earn profits after the latter year, he will escape, because in the next or third year of assessment he has earned none. I express no opinion as to whether, such a case occurring in the second year, the taxpayer could be reached under Case 6, which provides for the instances of profits not falling under any of the preceding rules. The point is not before us. For the rest, those who framed the Acts appear to have taken these chances of what Rowlatt J. refers to occurring. It seems to me that the true meaning of the words the Legislature has used is that the tax is intended as matter of basic principle to be on profits and gains forming income in the year of assessment, though not measured by the income of that year. If a man carries on business by buying and discounting bills, this is, I think, as much a source of profit as any other for the purposes of the words employed. As in the case before us it is agreed that there was no such source, I think that we have to assume that there was no income on which to base the tax. Reading the Income Tax Acts as a whole it appears to me that the tax is one of a single kind based, speaking broadly, on a single principle. It is imposed on existing

income, however the amount to be levied is to be computed in particular instances. This, my Lords, appears to be the scheme followed out in the Acts, and I think that if departure from it is alleged at any special point, the departure ought to be clearly demonstrated. The natural construction of the language of the Third Case of Sch. D appears to me to be that the tax is imposed only where there are profits and gains arising within the year of assessment, but that the amount payable is to be measured by reference only to the profits and gains arising within the preceding year. There is little room permissible for conjecture based merely on probabilities in a taxing statute. If I am right the appeal of the Crown should fail so far as the 1917–18 assessment is concerned. But I wish to add that, having regard to the words employed, I have only come to this view after doubt. As to the question which arises under the 1916–17 assessment, whether the whole of the differences received by the Institution are profits the Crown succeeds. The cross-appeal of the Institution directed to this point should fail. My Lords, in the Court of Appeal it was considered that having regard to the fact that each side had failed and each side had succeeded on a variety of points there should be no costs either in the King's Bench Division or in the Court of Appeal. Possibly your Lordships may think that that is the proper course to take in this case also—that there should be no costs either here or in the two Courts below.

VISCOUNT CAVE. My Lords, in *Brown's Case*, the questions raised on this appeal and cross-appeal are conveniently stated in the appellant's case as follows: (1.) Whether the transactions in Treasury Bills are transactions in discounts within the meaning of the second rule of the Third Case of Sch. D of the Income Tax Act, 1842, and liable to income tax in respect of the profits arising therefrom accordingly. (2.) Assuming that the transactions in such bills are transactions in discounts for the purposes of that provision, whether, when such a bill was sold before maturity, the entire profit on the transaction should be taken into computation, or

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Viscount Cave.

whether part should be deducted as representing an accretion of capital. (3.) Whether, upon the same assumption, the profits actually arising within a year from transactions in such bills taking place in that year escape taxation if in the next year no transactions in discounts take place, or, in other words, whether the principle of assessment on the amount of the profits of the preceding year laid down in the first Rule of the Third Case of Sch. D assumes as a requisite of chargeability the continued existence of the same source of profits in the year of charge.

Upon the first question, which turns upon the meaning of the word "discounts" in r. 2 of the Third Case of Sch. D of the Income Tax Act, 1842, I have no hesitation in agreeing with the decision of Rowlatt J. and of the Court of Appeal. A Treasury Bill (of which a form is set out in the appendix to the case) is a simple promise by the Treasury to pay to the holder or order a specified sum on a future date; any such bills (to quote a Treasury Minute of April 13, 1915) are drawn for three, six, nine or twelve months, as the case may be, and are issued "at fixed rates of discount" at the Bank of England. I am unable to see how the purchase from the Treasury of such a bill on these terms is anything but a transaction by way of discount. If it were decided otherwise, an easy way would be opened to moneylenders of evading the payment of tax on their interest on short loans. I agree that the cross-appeal, which relates only to this question, fails and should be dismissed. The second question, which turns on the meaning of the expression "profits on all discounts" contained in r. 2, presents more difficulty. The question is whether this expression includes the whole profit made by the sale of a discounted bill before maturity or only such part of that profit as is due to the advance of the bill towards maturity. Upon the whole I prefer the former view, which commended itself to Rowlatt J. and Warrington L.J. The expression "profit on a discount" is unusual, and (as Scrutton L.J. pointed out) is probably elliptical for "profit on a security bought at (or a transaction involving) a discount"; and if one has once embarked on

such a transaction, I think that the resulting profit, though enhanced by adventitious circumstances, is all profit on the discount. The value of a bill in the market may vary with the rise or fall of the value of money; but there is no real accretion to capital, for the amount secured by the bill remains unaltered.

I pass to the third and most difficult question; and in dealing with it I put aside the fact (referred to in the case stated by the Commissioners), that in the income tax year 1917–18 the respondents received some small sums for interest on short loans which might have fallen within the Third Case, as this circumstance was not relied upon by the appellants in the Court of Appeal and could not therefore be pressed in this House; and I proceed only to consider the question whether a taxpayer can be assessed to tax under the Third Case in respect of profits on discounts on the basis of the profits of that character made by him in the preceding year, although in the year of assessment no such profits have arisen. The fact that under s. 64 of the Finance Act, 1916, and s. 18 of the Finance Act, 1917, very large sums payable for interest on War Loans and Exchequer Bonds are brought within the Third Case, while it cannot alter the construction of the earlier statutes, gives greater importance to the question now to be determined.

My Lords, the sections of the Income Tax Acts under which duty is levied in respect of casual profits or profits of an uncertain value have been stated by the noble and learned Viscount on the Woolsack; and it is unnecessary to repeat them. I agree that they are difficult to construe, and I have felt considerable doubt as to their meaning; but upon the whole I have come to the conclusion that a person who is assessable to income tax in any year may be assessed upon the casual profits of the previous year, even though in the year of assessment he makes no casual profits. The duty under Sch. D is not a charge on profits, but a charge upon an individual in respect of profits. It is not a collection of taxes imposed in respect of different species of profit, but one tax imposed in respect of all; and its amount depends, not on

H. L. (E.)
1921
BROWN
v.
NATIONAL PROVIDENT INSTITUTION.
OGSTON
v.
PROVIDENT MUTUAL LIFE ASSOCIATION.
Viscount Cave.

the profits received by the taxpayer in the year of assessment, but upon certain "computations" which are prescribed by the rules governing the several cases. Under the Fourth Case, that relating to foreign securities, the computation is directed to be made on the sums received in the current year. Under the First, Second and Fifth Cases it is to be made on an average of the three preceding years; and under the Sixth Case it is to be made either on the receipts for the year or on an average as the Commissioners may direct. But under the Third Case (with which we are concerned) the duty is to be computed "at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year," and is to be "paid on the actual amount of such profits or gains, without any deduction." The substitution in this rule of "at" for "on" is significant, and, notwithstanding the somewhat confused language, the intention is, I think, reasonably clear that the taxpayer shall in each year be charged with duty upon the full and actual amount of the profits of this character which arose in the preceding year. In other words, the assessing officer is to shut his eyes, so far as this head of assessment is concerned, to the events or anticipations of the current year and is to look back to the preceding year and compute the duty on the figures of that year. He is to treat the profits of the preceding year as the ground and measure of assessment, and is to assess the taxpayer accordingly. A similar rule is laid down as regards super-tax by s. 66 of the Finance (1909–10) Act, 1910, where it is provided that for the purposes of the tax, the total income of an individual from all sources "shall be taken to be the total income of the individual from all sources for the previous year"; and although the language used in that section is different from that used in the first rule under the Third Case, it does not appear to me that the difference is material. I would therefore answer the third question raised on this appeal in the negative, and would hold (with Rowlatt J.) that as regards the profits comprised in the Third Case, the Legislature has regarded the taxpayer himself as the only source of profit which need exist

in the year of assessment and has taxed him upon any profits of this character which he may have made in the preceding year. It has been pointed out that the contrary view leads to strange consequences. The respondents admit that if they had made a profit on discounts to the amount of 10*l.* or 20*l.* in the year 1917–1918 they would have been assessable in that year upon the whole of the profits exceeding 20,000*l.* made in the preceding year; and yet they claim that because no such profits were made in the year 1917–1918 the large profits in the preceding year escape assessment altogether. If so, a taxpayer, if he should think fit to confine his transactions of this character to alternate years, would enjoy all his profits on such transactions without liability to tax. It has indeed been suggested that profits which so escape taxation under the Third Case might be assessed under the Sixth Case of Sch. D; but that case is confined to annual profits and gains "not falling under any of the foregoing rules," and I do not think that this could be predicated of any profits which (like profits on discounts) are expressly brought within the rules relating to the Third Case. Further under the Taxes Management Act, 1880, assessments for income tax are made during the currency of the income tax year, and under s. 82 of that Act the tax is payable on the first day of January, that is to say, about three months before the end of the year. The tax may therefore have to be assessed and paid before it can be known whether the person assessed will or will not earn profits falling within the Third Case in the income-tax year; and if the construction for which the respondents contend is correct, his liability to assessment will depend upon facts which may be unknown when the assessment is made. In truth the argument for the respondents in this case, if successful, would render the Acts wholly unworkable. It is no doubt true that if on the true construction of a statute, not excluding a taxing statute, a lacuna or defect appears, it is no part of the duty of the Court to supply the deficiency; but in choosing between two competing constructions, each of them possible, it is not irrelevant to consider that one of them is consistent with the obvious

H. L. (E.)
1921
BROWN
v.
NATIONAL PROVIDENT INSTITUTION.
OGSTON
v.
PROVIDENT MUTUAL LIFE ASSOCIATION.
Viscount Cave.

purpose of the Act while the other would render the statute capricious or abortive.

But it is said—and I think that it is mainly upon this argument that the Court of Appeal has rested its judgment—that the Income Tax Acts proceed upon a general scheme or principle—namely, that an assessment for a year requires a taxable subject-matter in that year; and it is said that this general rule applies to every schedule except Sch. D, and to every case in Sch. D other than Case 3 (with the possible exception of Case 6) and even to the third rule of Case 3. This may be so, but even in that case I do not think that it can be inferred that the so-called scheme or principle extends to the whole of Case 3. The matters dealt with in the other schedules and cases—lands, farms, annuities, trades, professions and foreign securities and possessions—have an element of continuity or recurrence; but the profits of an uncertain value classified in Case 3 are in their nature casual and intermittent, and it is not surprising that these exceptional matters should be made subject to exceptional rules. The only general scheme or principle which I can find in the Acts is that "every description of property or profits" shall somehow bear the tax.

In *Ogston's Case* it was agreed by counsel on both sides that this case could not be distinguished from *Brown's Case*, and accordingly I am of opinion that it should be disposed of in the same manner.

LORD ATKINSON. My Lords, the National Provident Institution during the years ending April 5, 1916, and April 5, 1917, respectively, embarked in the business of purchasing from the Treasury Exchequer Bills at less than their face value, and then either selling them during their currency or holding them till maturity, and obtaining the amount contracted to be paid. In both these years the Institution made considerable profits out of these transactions. In the year ending April 5, 1918, they ceased altogether to carry on this business, and, the source of their profits and gains having thus dried up, no profits or gains from this source arose

or accrued to the Institution during that year. The appellant contends, however, that notwithstanding this fact, he is entitled under Sch. D, Case 3, rr. 1 and 2, of the Income Tax Act of 1842, to assess the Institution in respect of this very year for income tax on a sum not less than the income it derived from this same source in the previous year—namely, the year ending April 5, 1917.

Putting aside for a moment the case of super-tax, with which I shall presently deal, I may, speaking entirely for myself, say that, in my opinion, this contention is unsustainable. It ignores the vital fact that income tax is primarily a tax upon a real, not an imaginary, income accruing to the taxpayer during the year of assessment, and is, in my view, out of harmony with the whole scheme of the Income Tax Code, and the principles which that code embodies. The contention can, I think, only be plausibly supported by confounding the different measures which the statutes provide for ascertaining the amount of the taxable income of a taxpayer with the thing to be measured, the income itself. In many cases within the Income Tax Acts the amount of the taxable profits and gains arising or accruing to the taxpayer from a particular source during the year of assessment is measured at something not less than the profits and gains arising or accruing to him from that source during the immediately preceding year, or at something not less than the average income derived by him from this source during the three preceding years. But the Solicitor-General frankly admitted, on the behalf of the appellant, that no case could be found in the books deciding that a taxpayer to whom no profits or gains accrued from a given source during the year of assessment, could be treated as having received profits and gains from that same source not less in amount than those he received from it in the immediately preceding year. No authority is, therefore, available to support the appellant's contention. It is scarcely possible to suppose that if it were sound, it would not have been put forward and ruled upon during the 79 years which have elapsed since the Income Tax Act of 1842 was passed. In truth, the appellant is in

H. L. (E.)
1921
BROWN
v.
NATIONAL PROVIDENT INSTITUTION.
OGSTON
v.
PROVIDENT MUTUAL LIFE ASSOCIATION.
Lord Atkinson.

this case endeavouring to apply to ordinary income tax the principle embodied in s. 66, sub-s. 2, of the Finance Act of 1910 for the assessment of the super-tax. That section provides that for the purpose of the super-tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year. Here the income of the previous year is not made the measure of the amount of the income of the subsequent year. It is itself treated as the actual income of the subsequent year, the year of assessment, and is taxed accordingly. So in the present case the appellant seeks to substitute the income of the previous year for the cypher which represents the actual income of the subsequent year. There is not in the whole Income Tax Code dealing with ordinary income tax any enactment corresponding to s. 66, sub-s. 2, of the Finance Act of 1910. There is no language in the Code directed to effect an object similar to that aimed at by the Legislature in the case of the super-tax. From this, I think it may safely be inferred that if the Legislature had desired to bring about a result, in the case of ordinary income tax, similar to that brought about in the case of the super-tax, they would, in some of the many Income Tax Acts which have been passed, have in clear and explicit language so provided. The Legislature has not done that. As, however, the Solicitor-General has resolutely pressed the above-mentioned contention on the part of the appellant, which, if sound, would produce results of vast importance, one may be excused for analysing some of the main provisions of the principal Income Tax Acts passed since 1799 at greater length than would, under other circumstances, be pardonable.

The first of these, the Act of 1799 (39 Geo. 3, c. 13), by its second section, provides that "there shall be raised, levied, collected, and paid annually unto and for the use of His Majesty, His heirs," etc., "upon all income arising from property in Great Britain belonging to any of his subjects although not resident in Great Britain, and upon all income of every person resident in Great Britain and upon that of every Body Politic," etc., "whether such income shall

arise from lands, tenements, or hereditaments wheresoever the same shall be situate, in Great Britain or elsewhere, or from any kind of personal property, or other property whatever, or from any profession, office, stipend, employment, trade, or vocation, the several rates and duties mentioned in the Act." The machinery set up for the annual collection of these duties was roughly this : The assessors were every year to give notice to the taxpayers of the sums claimed against them ; the taxpayers were obliged to deliver to the assessors any objections they might have to these claims (s. 28). The Commissioners named were to decide upon the validity of those objections and then assess the taxpayer accordingly. By the amending Act of the 39 Geo. 3, c. 22, substantial alterations were made in the former Act which are immaterial for the present purpose. But by neither statute was any measure provided by which the amount of the income liable to taxation was in any case to be fixed. It is clear, therefore, from the provisions of these statutes that the taxpayer was each year obliged to pay the duty on the income he received or was entitled to receive during that year.

Two obvious objections, however, applied to this method of collecting the tax. First, the taxpayer's income from all sources was disclosed, and next the amount of the income to be taxed could not be ascertained till the last day of the year of assessment. To remove the first of these objections, a new method of assessment was provided by the Income Tax Act of 1803 (43 Geo. 3, c. 122). It was this. In lieu of the taxpayer's general return of his income from all sources, the tax was divided into five parts having relation to the particular sources from which the income was derived—namely, Sch. A dealing with the portion of the tax leviable on owners of land, including houses ; Sch. B dealing with occupiers of land ; Sch. C dealing with the case of fund holders, etc. ; Sch. D dealing with the annual profits and gains arising or accruing to any person residing in Great Britain or elsewhere, from any profession, trade, or vocation carried on in Great Britain or elsewhere, or arising or accruing

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Lord Atkinson.

to any person or persons whatsoever in Great Britain, from any profession, trade, employment, or vocation exercised in Great Britain, and provided that the annual amount of all these respective profits and gains should be charged at the yearly sum of one shilling for every twenty shillings of the amount thereof, and further provided that the above mentioned duties should be charged upon every description of profits and gains not chargeable under Schs. A, B, C, and E. The amount of the income to be taxed under Schs. A and B was fixed as it is now. But as to all the other schedules, no measure of the profit and gains arising or accruing from any of the sources mentioned was prescribed or indicated. From this legislation one sees clearly what was the true nature of income tax. It was a single tax divided into different parts merely for the convenience of collection. It was a tax assessed, levied, and collected yearly on the profits and gains arising and accruing during the year in which it was collected from one or more of the sources named. If this be so, as in my opinion it clearly is, it necessarily follows that if in the year of assessment a source of income should dry up and no income accrue, then no tax could be levied or collected in respect of a non-existing income.

The next Income Tax Act of importance is that passed in the year 1806, but as the Income Tax Act of 1842 (5 & 6 Vict. c. 35) is practically a reprint of this Act of 1806, with some alterations and additions which are immaterial for the purposes of this case, one may safely proceed at once to the consideration of the provisions of the latter statute. It begins, after the manner of its predecessors, by enacting that from April 5, 1842, there shall be charged, raised, levied, collected, and paid to Her Majesty, her heirs and successors during the period named, the several rates and duties mentioned in the several schedules contained in the Act marked A, B, C, D, and E respectively. In each and every one of these schedules it is provided that the duties shall be charged yearly. In Schs. C and D it is further expressly provided that the annual profits and gains arising or accruing to any of the persons therein respectively

mentioned shall be charged yearly for every 20*s.* of the amount thereof (i.e., of the profits and gains) the sum of 6*d.* without deduction. In Sch. D itself it is enacted that the several duties mentioned therein shall be charged annually and paid by the persons or bodies who receive or are entitled to receive the same. The First Case in that schedule deals with the duties to be charged in respect of any trade, etc., and its first rule provides that the duty to be charged upon the profits and gains which the taxpayer is entitled to receive is to be computed on a sum not less than the full amount of such profits and gains of such trade on a fair and just average of the three years immediately preceding the year of assessment upon which the accounts of the trade are usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid accordingly. Special provision is then made for each of these two cases; (1.) where the trade shall have been set up within this period of three years; and (2.) where the trade shall have been set up within the year of assessment. It will be observed that this average sum is a minimum. It only fixes the lower limit of income to be taxed. It is a measure to be applied not, however, to a vacuum, or to a non-existing thing, but to an existing thing, the amount of the profits and gains actually arising or accruing to the taxpayer within the year of assessment. Much less is this average sum a substitute for this non-existing thing to be dealt with as if it had arisen or accrued to the taxpayer during the year of assessment. In the second case, a different measure of income is provided, but the same considerations apply to it. In the Third Case of this same Sch. D, upon which the present case turns, the sum to be taxed is the amount of the profits and the gains of an uncertain value. This sum, by r. 1 of this Case, is to be computed at a sum not less than the profits and gains arising therefrom within the preceding year ending as in the First Case. Again, this computed sum is a measure, and is not a substitute for the sum which has actually accrued. The rule ends up with this rather significant statement, that the tax is to be paid on the actual amount of such profits

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Lord Atkinson.

or gains without any deduction. It is not quite clear what these last words mean. Does "the actual amount" mean the computed amount? As the computed sum is a minimum that can hardly be so; or does it mean the amount in fact received? Whichever of the two it means it gives no support to the contention of the appellant that this minimum can be treated as a substitute for a cypher and used to fill a vacuum. By r. 2 of this Case, profits on all discounts, which I presume means profits arising and accruing from all discounts, are to be charged, according to this first rule. In the Fourth Case of Sch. D no measure of the sum to be taxed is provided and the true nature of that sum is consequently made more fully apparent. The duty to be charged under this Case is to be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year without any deduction. The words "will be received" are evidently introduced to get over the difficulty of having to wait till the end of the current year to make the assessment. It is obvious that in this Fourth Case if the source of income dried up and nothing was received in Great Britain, no tax could be levied. In Case 5, the income is again to be measured by the three years' average, and the remarks I have already made as to Case 1 apply to it.

The Solicitor-General contended that r. 2 of this Case 3 of Sch. D was itself a charging enactment, because of the presence in the rule of the words "shall be charged according to the preceding rule." I cannot concur in this view. Sect. 102 of the Act of 1842 is the charging section. It is general in its terms and applies to all annuities, yearly interest on money or other annual payments, etc., and enacts that there shall be charged for every 20*s.* of the annual amount thereof a sum of 7*d.* without deduction, according to and subject to the provisions by which the duty in the Third Case of Sch. D may be charged. This clause would be inappropriate if r. 2 of Case 3 was a charging clause. The words "charge according to the preceding rule" mean, I think, simply that the measure indicated in r. 1 is to be

applied to fix the minimum of the sum to be taxed. Nothing more.

By the Income Tax Act of 1853 (16 & 17 Vict. c. 34) Ireland was for the first time subjected to income tax. Many special provisions had to be introduced into the measure to make it applicable to that country. But the main and charging part of the statute runs on almost the same lines as does the Act of 1842. Its first section has been repealed by the Statute Law Revision Act (38 & 39 Vict. c. 66). Notwithstanding this repeal, however, it is quite legitimate to consider the provisions of the section in the endeavour to ascertain what was the scheme and principle of the statute of which it forms part. The section provides, as the corresponding section of the earlier Act provided, that the several rates and duties mentioned therein shall be charged, levied, collected and paid yearly unto and to the use of Her Majesty, her heirs, etc., and that the duties arising from the several sources enumerated shall be paid in respect of the annual profits and gains arising or accruing to any person or persons. By s. 2 it is provided that for the purpose of classifying and distinguishing the separate property, profits and gains for and in respect of which the said duties are by the Act granted, and for the purpose of the provisions for assessing, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules, contained in the Act marked respectively A, B, C, D and E, and to be charged under such respective schedules. As in the immediately preceding Act, Sch. A deals with the ownership of land; Sch. B with its occupation; Sch. C deals with interest, annuities, or dividends payable out of any public revenue, and Sch. D with the annual profits and gains arising or accruing from any of the properties, professions, trades, employments, or vocations mentioned therein, and also from interest of money, annuities, and other annual profits and gains not charged by virtue of any other schedule contained in the Act. It then enacts that the duties to the

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Lord Atkinson.

amount mentioned shall be charged thereon. As under the other statute, these duties are to be levied yearly. They are to be levied on the annual profits and gains arising or accruing to the person or persons entitled thereto. It would appear to me that these provisions clearly indicate, that if no profits or gains arise or accrue from one of the named sources to the person entitled, during the year in which the duties are to be "charged, raised, levied, collected, and paid," i.e., the year of assessment, that person cannot be made liable to pay any income tax in respect of that source. By s. 5 of this Act of 1853 it is provided that the duties by the Act granted shall be assessed, raised, levied, and collected under the regulations and provisions of the Act of 1842 and the several Acts therein mentioned or referred to, and also of any Act or Acts altering, amending, or continuing the same. For the reasons I have already mentioned I think this appeal wholly fails upon the main point urged by the Solicitor-General.

The respondent relied upon a point which is made the subject of the cross-appeal. It is this: That the words "on any discount" occurring in r. 2, Case 3, do not describe or cover transactions such as those by which the respondent made the profits admittedly made in the years ending April 5, 1916, and April 5, 1917, respectively. The words are not happily chosen, but must, I think, be taken to mean "all profits arising from discount." These words are immediately followed by the words "and on all interest of money, not being annual interest, payable or paid by any person whatever." The so-called Treasury Bills in form resemble much more promissory notes or I.O.U.'s than ordinary Bills of Exchange. The specimen bill printed in the Appendix is in the following form:—

"London,

This Treasury Bill entitles*.....or order to payment of .....pounds at the Bank of England out of the Consolidated Fund of the United Kingdom on the.....

Secretary to Her Majesty's Treasury.

* If this blank be not filled in, the Bill will be paid to bearer."

It is obvious that if the Treasury in consideration of a loan of 100*l.* by an instrument closely resembling this instrument contracted to pay three months after date the sum of 100*l.* with 12 per cent. per annum interest the holder of the instrument would at the end of the three months be entitled to receive 100*l.*, the original sum secured, plus 3*l.* remuneration, in the form of interest, for the use of his money during these three months. It is equally plain that if the Treasury in consideration of a loan of the same sum contracted to pay 103*l.* at the end of the three months without interest, the respective parties would at the end of that period be in precisely the same position as in the first case. The Treasury would have had the use of the lender's money for three months and the lender would have got the same remuneration for its use. This second transaction, in its essence, closely resembles the transaction which took place between the Treasury and the respondents, where the latter bought an Exchequer Bill at less than its face value and held it till it is paid at maturity. The difference between the amount paid for the bill and the amount received at its maturity, it is contended by the respondents, is not to be "profit on discount" nor yet interest, but an accretion of their capital. Sir William Finlay, however, admitted on the part of the respondent that if the payee of an ordinary promissory note indorsed it to his banker, receiving for it from the banker such sum as the latter may agree to give him, the transaction would amount to a discounting transaction, but contended that the difference between that transaction and the sale by the holder of a Treasury Bill consisted in this: that in the first case it was the payee not the maker of the note who sold and transferred the security. I do not think this contention is sound. The word "discount" is in the Oxford English Dictionary defined, in its primary meaning, as an abatement or deduction from the amount, or from the gross reckoning or value of anything, and, as used in commerce (1.) is defined to mean a deduction (usually at a certain rate per cent.) made for payment before it is due of a bill or account; or any deduction or abatement from the nominal

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Lord Atkinson.

value or price; (2.) "the deduction made from the amount of a bill of exchange or promissory note by one who gives value for it before it is due." The profits made by the respondents by buying these bills from the Treasury at something less than their true face value, and selling them during their currency at an advanced price, or by keeping them till maturity when their face value was paid by the Treasury, are, in my opinion, profits "on discount" within the meaning of Case 3, r. 2, of Sch. D. The Court of Appeal have, however, as I understood, held that, while in the case of a Treasury Bill bought for a sum less than its face value, held until maturity and then paid by the Treasury, the difference between the two sums is a profit "made on discount," and not an accretion of capital, yet, when one of these bills is, during its currency, sold by the holder at an enhanced price, the transaction is a discount transaction, but the entire difference between the two prices is not "a profit on discount" within the meaning of the rule and that the portion of the difference which is due to the fact that the value of the bill is enhanced by its nearer approach to maturity cannot be so regarded. It might, the Master of the Rolls said, possibly be "taxed as profits on a business of discounting," but the Crown have deliberately elected not to assess the plaintiff under this head. With the greatest respect, I am quite unable to appreciate this distinction. When one of these bills is purchased from the Treasury, all the rights it confers are purchased with it. One of those rights is that the holder of it can enforce payment of it by the Treasury at its maturity. When it is resold at an enhanced price that same right is purchased by the purchaser. The right is the same in quality and character on the occasion of both sales. It is true that the right may have appreciated in value by the time the second sale takes place, because the day for payment of the bill is nearer. But if the transaction of purchasing and selling such a bill be, as it has been by the Court of Appeal held rightly, I think, to be, a discounting transaction, otherwise no part of the difference between the two prices would be profits on

discount, I utterly fail to see how the entire difference between the original price and the enhanced price, which has been obtained, by and through this discount transaction, is not a "profit on discount" within the meaning of Case 3, r. 2. Moreover, I doubt if the principle on which this distinction rests would be capable of application in practice. There is scarcely a bond of a foreign State offered for subscription or sale on the London market which is not conditioned to be redeemed on a certain specified date. There is frequently another condition added that a certain number of these bonds shall be drawn for payment annually and when drawn immediately paid. If one of these bonds, after having been held for a considerable time by a person who subscribed for it, should be sold for a much enhanced price, is not only the portion of the enhanced price due to the near approach of the day of payment to be deducted from the difference between the two above-mentioned sums, but, in addition, must not a sum representing the value of the vendor's chance of having his bond drawn at some of the future annual drawings and the day of payment thereby greatly accelerated be also deducted? If the dealing with this bond would be a discount transaction, as I think it would be, I am unable to see why the principle relied upon by the Court of Appeal should not be thus applied, and yet I think it would be obviously impossible to apply it.

I am of opinion that both the appeal and cross-appeal fail. I think the order appealed from should be amended by deleting the portion of it which varies the order of Rowlatt J., and that as amended it should be affirmed and this appeal be dismissed. It was suggested in argument that the profits made in the year ending April 5, 1916, might be taxed under Case 6. I express no opinion on that point, as, even if it could not be so taxed, that would not justify the taxation of a not existing thing.

LORD SUMNER. My Lords, the cross-appeal is logically the first to be disposed of, for, if the transactions, which the Inland Revenue desires to charge, are not taxable transactions

H. L. (E.)
1921
BROWN
v.
NATIONAL
PROVIDENT
INSTITUTION.
OGSTON
v.
PROVIDENT
MUTUAL
LIFE
ASSOCIA-
TION.
Lord Sumner.

at all, we need not discuss the conditions under which they are to be taxed. The contention is that the profits charged are not profits on discounts, because they are profits on realization of investments, which are accretions to the capital invested. Further it is said that an investment in Treasury Bills or any similar securities may be one which locks up capital for a term of years, and consequently its release on realization cannot result in annual profits or gains or in taxable income. An accretion after several years of investment is so much more liquid capital not so many years' annual profits aggregated. The whole gain might accrue in one year, though only realized afterwards. In any case, the transaction should be subjected to economic analysis, so that only that part of the profit, which represents the consideration to the taxpayer for the use of his money, may be brought into charge and not the capital advantage derived, for example, from an intermediate sale of the bill before maturity. The case has been argued as though the second rule of Case 3 of Schedule D either referred principally or exclusively to dealings in Treasury Bills and similar securities or ought to be construed as exclusive of such instruments, because, at any rate in their present form, they were not in use in 1842. No doubt it is common to speak of buying or selling Treasury Bills and to a large extent such a transaction is the converse of lending money to the Treasury at interest periodically due. The rule, however, relates to "profits" on all discounts from whomsoever made. There is no definition of discount in the statutes; no restriction of it to transactions in use in the year 1842; no evidence of its meaning as a term of art at any time. I take it that the rule applies equally whether the lender solicits the privilege of furnishing money to the Treasury at prices, which it fixes by virtue of the possession of still unsurpassed credit, or whether the borrower approaches the lender hat in hand and offers his acceptance with or without "another name" in order to obtain temporary accommodation. It includes both the transaction as between the original parties and the transaction as modified by the introduction of the bona fide holder

for value. In both cases there are two economic elements, the one the value of the usufruct foregone, as measured by interim interest, and the other the risk that the money will never be repaid at all. In the case of the Treasury Bill the latter element may be said to reach its vanishing point; in the other it is probably much the most important factor in the transaction. Discount, however, is a term appropriate to its evaluation, whether it be an off chance or all but a certainty. It is all one thing, discount, whether the return to the lender is compounded of premiums for risk and interest on money in one ratio or in another. Furthermore, there is nothing to show that under this section profits on discounts have to be analysed into a return for the use of money by way of income and a possible accretion to capital. If the acceptor comes into a fortune before the bill matures, no doubt its value increases out of all proportion to the approach of the due day, but to say that it is a case of an investment which has appreciated, seems to me to be a misuse of language. The plain fact is that the discounting has been less hazardous and so more profitable than was expected. The money-lender stood out for a premium on the full risk, and gains by the risk turning out to be small. When a Treasury Bill is bought, the profit is chiefly a matter of the future value of money, but one need not go far to discover that, in the case of the Treasuries of foreign powers at least, the chance that the obligation may not be met at all enters very practically into the calculation. It is only where repayment is a certainty that the "purchase" of instruments like this can be a matter of interest only, either in the form of the interest to be paid, if the price payable for the bill is itself borrowed, or in the form of the interest, which might have been earned on that price, if it had not been applied to the purchase of the instrument. Mere interest can be no compensation, if there is default in payment of the principal sum; and so if there is a possibility of default something more than interest is involved. Discount is the apt term to provide a consideration for both matters and the transactions are but few, in which there is absolutely no risk of a default at maturity.

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Lord Sumner.

I see no utility in calling this an investment, a term which is quite undefined and is often applied to speculations and to purchases of chattels as well as of securities. In a sense one who discounts a long dated bill "invests" capital in it, but that is not the question. The real question is whether he discounts it. Unless it can be affirmed that he does not, the profits of the operation, investment or no investment, fall within this rule, and I certainly cannot affirm that the respondent did not discount here. It is to be remembered that this is a case of a company, which carries on a business and employs its funds for and in that business. The case stated finds no fact to distinguish these transactions from any other business use of money. It is not the case, as to which I say nothing, of a private person, who, not in the course of any business at all, realizes an investment and comes well out of it. Similarly I see no warrant for trying to discriminate between the capital used in the transaction and the income obtained from its use. The statute says nothing about it. To discount a bill, even a Treasury Bill, you must have money or money's worth, but whether an accountant would say that it came out of or should be debited to capital or income makes no difference to the fact of discounting. The excess of what is got back to-morrow over what is put in to-day is profit, and it is but rarely that even an economist can tell what is appreciation of capital and what is not. The Acts invite no such curious inquiry as the Court of Appeal directed on this point. I agree also that no difference arises by reason of a transfer of the bill from one holder to another, except for the purpose of determining who is to be charged, or by reason of the conversion of Treasury Bills into War Loan.

My Lords, as to the appeal the Inland Revenue claims to be entitled to charge duty on profits on discounts in a year, in which no such profits have been earned, as if they had been earned, and then to compute the amount of the duty upon these non-existent profits at a sum not less than the amount of such profits earned in the next preceding year. If this claim is to be made good it must rest on Schedule D, Case 3, r. 2,

which is said to be the charging section, for no other words of charge can be found in the Acts to produce this result, nor do any other clauses so far strengthen r. 2, as to make it do with their assistance, what it would not be sufficient to do of itself. I agree that r. 2, so construed, is in complete contradiction to the whole scheme of the Acts; that to make this rule an independent charging section at all is to disturb the framework of the charging and the computing sections; that, if the Crown is right, words were borrowed in 1842 from the earlier legislation substantially identical in form but wholly different in sense, and that, if so, the Legislature in 1842 gave to the Inland Revenue retrospective powers of taxation, which that department either failed to recognize or dared not use. These considerations, however, really go to the question what was the Legislature likely to mean, while the true question is what is the meaning of what it said?

It is a most wholesome rule that in taxing the subject the Crown must show that clear powers to tax were given by the Legislature. Applied to income tax, however, this is an ironical proposition. Most of the operative clauses are unintelligible to those who have to pay the taxes and in any case derive such clarity as they possess from the judges, who have interpreted them. After the puzzle has been solved no doubt the answer seems clear and the solution is arrived at as a matter of construction. The question is always what is the meaning of the words of the statute? If they have none there is no need to invoke the proposition, that the meaning must be clear. I will therefore address myself to the construction. The duties granted in Schedule D are to extend to every description of property or profits (note this antithesis) not contained in Schedules A, B or C, and to every description of employment of profit not contained in Schedule E and are to be charged annually according to rules classified under certain cases. Case 3 is "the duty to be charged in respect of profits of an uncertain annual value" and the first rule states how the duty to be charged in respect of such profits is to be computed. The next rule,

H. L. (E.) 1921 BROWN v. NATIONAL PROVIDENT INSTITUTION. OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION. Lord Sumner.

No. 2, states how certain other profits are to be charged. They are other profits, because two of the three classes are not of uncertain annual value at all. Profits on securities bearing interest payable out of the public revenue and profits on interest of money not being annual interest are certain and the annual value can be calculated from the rate for a period less than a year with ease and certainty. These other profits are to be charged "according to the preceding rule in this case," that is to say "the duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ... to be paid on the actual amount of such profits or gains."

Now, when a person makes such profits for a series of years and then ceases to make them, in the first year of the series he makes them without any preceding year, by the gains of which his first actual gains can be computed, and at the end of the series comes a year in which, though there is a preceding year by the gains of which to compute them, there are no actual gains of this last year to be computed. The first is the case of bill-discounters in 1842; the second is the case of the respondent Institution in the year of charge in question. If r. 2 is a rule imposing a charge, and that charge is imposed sub modo, as the rule directs, the charge comes to nothing, for though the computation is possible the payment of the charge is not; there is nothing to pay on. The rules do not say that for the purpose of payment of duty profits shall be deemed to have been made in the second of two years to the same amount as those made in the first. They say that "the" profit, that is, the profit made in the year of charge, shall be charged as if the amount of it were so and so. How can "the profit" (that is the profit of the year of charge) be charged, if there is none? If, on the other hand, r. 2 is read as charging absolutely and not sub modo, which is the only possible alternative, but is not in accordance with the language used, then profits (not the profits, but any profits of the kinds mentioned) shall be charged, without restriction to the year of charge; but the computation

prescribed in r. 1 is obligatory, and charge and computation go inseparably together. Only the one mode of computation is possible. On this construction, such profits made in 1842 were charged and yet could not be charged, because they could not be computed. The same would be true, whenever a year of profit-earning followed on the heels of a barren year. Further, if there are two barren years, it is clear that the taxpayer escapes in the second year. This argument would make him escape, not because he made no profits in the second year, but because he had not set up for himself a fatal standard of comparison in the prior year. Contrariwise, if r. 2 is an absolute charge, it charges profits, not the absence of profit; it charges profit to which a computation can be applied, resulting in a sum to be paid on something. In a year when there is no profit, how can such a computation be applied? It becomes a calculation of a sum to be paid on nothing, and I think that means not to be paid at all. These rules, it must be admitted, handle prepositions a little freely, for the first rule computes the duty "at" the full amount earned, not "on" it, but one such slip is enough; to be paid "on" the actual amount cannot be amended into to be paid "notwithstanding" the actual amount. In my opinion, r. 2 clearly means that the profits, when chargeable, shall be charged on a certain computation. Like its predecessors, the rule is a computation rule and is rather compressed. If it had been independently and fully expressed I think it would have run thus: "Second, the duty to be charged in respect of the profits on all discounts shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, and, when charged, shall be charged accordingly."

It is said, and truly, that inconvenient results, involving loss of tax, may follow upon the conclusion that there must be some profits on discounts made in the year of charge before there can be any computation of tax on them by reference to similar profits made in the previous year; for example, by earning and forbearing to earn profits on discounts in

[H. L. (E.) 1921

BROWN v. NATIONAL PROVIDENT INSTITUTION.

OGSTON v. PROVIDENT MUTUAL LIFE ASSOCIATION.

Lord Sumner.

alternate years, a taxpayer might escape taxation on this kind of profits altogether. I am not much impressed by such an inconvenience, for this in-and-out attention to business is easier to state in theory than to carry out in practice, nor is the whole field of making profits on discounts so large as to make this risk a very serious matter. In any case, statutory language cannot be construed by asking which construction will most benefit the revenue. It is true that it is the subject who is taxed. He it is who has to pay, though he pays a tax charged on a particular kind of annual profits or gains made by him and not otherwise, but his mere continued existence ought not to suffice to bring into operation the previous year's profits on discounts as a measure of computing something, which is purely notional, no profits of the kind having been earned in the year of charge at all. The effect would be that the taxpayer, having paid tax on the whole of his actual income for the year of charge, would have to pay out of it and really on it another tax—namely, the tax on the prior year's profits on discounts, which he has not made in the year of charge at all; that is to say, he would to this extent be taxed twice over, on the ground that the Legislature had not thought it convenient to tax him at the very time when he really did make the profits on discounts. This is, I think, more than the words of the Act can bear. On the other hand, with all respect to the noble and learned Viscount, I am unable to take the view that income tax on profits on discounts is really charged on the profits of the year, in which they are earned, but payable in the year following. We are told that all income tax is one. This construction tends to make income tax on profits on discounts a separate tax similar to super-tax, which is contrary to the scheme of the Acts. Super-tax on the other hand, is charged on an income, which is "taken to be" the previous year's income, not merely "computed at" a sum not less than the previous year's income.

As to the point on which the Court of Appeal referred the case stated to the Commissioners, I think the appeal succeeds, but it should on all other points be dismissed.

The Orders of the House in the two cases were in identical terms.

Order of the Court of Appeal complained of in the original and cross-appeals varied by discharging such order so far as regards the words "but that the judgment of Mr. Justice Rowlatt be varied and the Case stated be referred back to the Special Commissioners to adjust the sum on which the said assessment for the said year should be made on the principle of ascertaining the profits on discounts arising to the appellants from interest accrued on such of the said bills as were sold or converted before maturity and excluding any other profit from assessment in the case of such bills"; and, subject to such variation, affirmed, and original and cross-appeals dismissed; no costs to be allowed to either side here or below.

Lords' Journals, June 3, 1921.

Solicitor for the appellant in each case: *Solicitor of Inland Revenue.*

Solicitors for the respondents in each case: *Hair & Co.*

[HOUSE OF LORDS.]

H. L. (I.)* 1921 June 24.

JOHNSTONE . . . . . APPELLANT;

AND

PEDLAR . . . . . RESPONDENT.

Alien—Friendly or Enemy—Citizen of friendly State personally hostile to Crown—Right to sue—Tort—Action against King's Officer in respect of the Seizure and Detention of Alien's Property—Ratification by Crown—"Act of State."

It is not a good defence to an action of tort brought by a friendly alien resident in the United Kingdom against an officer of the Crown in respect of the wrongful seizure and detention of the alien's property that the seizure and detention have been adopted and ratified by the Crown as an act of State.

The plaintiff, who was born in Ireland, having become a naturalised American citizen, returned to Ireland in 1916 and took part in the rebellion of Easter, 1916, and was interned. On his release he took part in illegal drilling, and, on being arrested in Ireland, a sum of money was found upon him, which was taken and detained by the police authorities, the seizure and detention being subsequently ratified by the Chief Secretary for Ireland. In an action by the plaintiff against the Chief Commissioner of the police for the recovery of the money, the defendant pleaded that the plaintiff was an alien and that the money was detained by direction of the Crown as an act of State:—

Held, that the plea was bad and that the plaintiff was entitled to judgment.

Semble, the fact that a subject of a friendly State residing within the realm under an implied licence from the Crown violates the local allegiance which he owes to the Crown does not disentitle him to the rights of an alien amy until the Crown withdraws its protection.

Order of the Court of Appeal in Ireland [1920] 2 I. R. 450 affirmed.

APPEAL from an order of the Court of Appeal in Ireland reversing an order of the King's Bench Division in Ireland and ordering judgment to be entered for the plaintiff in the action. (1)

The respondent was an Irishman by birth, but had become a naturalised American citizen. In 1916 he returned to Ireland and since then he had, with some interruptions, resided in that country. The action was brought by the respondent against the appellant, the Chief Commissioner

* *Present:* VISCOUNT FINLAY, VISCOUNT CAVE, LORD ATKINSON, LORD SUMNER and LORD PHILLIMORE.

(1) [1920] 2 I. R. 450.

of the Dublin Metropolitan Police, for the return of a sum of cash and a cheque, both the property of the respondent, which had been found upon his person and seized by the police on his being arrested in Ireland for illegal drilling, with damages for their detention, or alternatively for damages for the conversion of the said money and cheque.

The substantial defence to the action was that the plaintiff was an alien and the said moneys and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an act of State for the defence of the realm and for the prevention of crime.

At the trial of the action before Pim J. and a common jury the learned judge directed the jury to find for the appellant (the defendant) and entered judgment for him accordingly.

A motion by the respondent to have this judgment set aside and judgment entered for him instead was refused by the Divisional Court (Dodd, Gordon and Moore JJ.), but their decision was reversed by the Court of Appeal by a majority (Ronan and O'Connor L.JJ., O'Connor M.R. dissenting), and judgment was entered for the respondent for payment of the money and delivery up of the cheque.

The facts are fully set out in the judgment of Viscount Finlay and are sufficiently summarised in the headnote for the purposes of the argument.

1921. April 12, 14, 15. *Serjeant Sullivan* (of the Irish and also of the English Bar) and *Serjeant McSweeney* (of the Irish Bar) (with them *Cecil Fforde K.C.* and *Lipsett* (both of the Irish Bar)) for the appellant. It is a good defence to an action of tort by an alien against an officer of the Crown that the act complained of has been adopted by the Crown as an Act of State: *Poll* v. *Lord Advocate* (1); *Buron* v. *Denman*. (2) This proposition is well illustrated by a comparison of the cases of *Madrazo* v. *Willes* (3) and *Buron* v. *Denman*. (2) In each case the

(1) (1899) 1 F. 823, 827. (2) (1848) 2 Ex. 167.
(3) (1820) 3 B. & Al. 353.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR.

commander of a British ship was sued by a Spanish subject for the wrongful liberation of slaves and the destruction of property engaged in the slave trade. In the first case, where no ratification by the Crown was proved, judgment was given for the plaintiff; in the second case, where the Crown adopted the action of the officer, judgment was given for the defendant. The latter case therefore establishes that an alien cannot sue a King's officer for an act of State in respect of a tort for which the officer would otherwise be liable. This is borne out by the comments of Cockburn C.J. upon that decision in *Feather* v. *The Queen* (1) where he says that *Buron* v. *Denman* (2) shows "that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the government of this country, it becomes an act of state and the private right of action becomes merged in the international question which arises between our own government and that of the foreigner." In *Phillips* v. *Eyre* (3) Willes J., in discussing the effect of ratification as applied to the exercise of sovereign authority, says that where the act of the agent, though originally unlawful, becomes by after ratification an act of State, the original right of action is divested and all civil liability extinguished, and he cites *Buron* v. *Denman* (2) as an illustration of this principle. *Musgrove* v. *Chun Teeong Toy* (4) also supports the appellant's contention. *Porter* v. *Freudenberg* (5), in point of decision, does not apply, and the dicta of Lord Reading C.J. relied on by the Court of Appeal in Ireland are obiter only.

Further, the respondent by taking part in the Irish rebellion has forfeited his right to be treated as an alien amy. Mr. Dicey in his Law of the Constitution, p. 222, says that if a body of foreign anarchists came to England and were thought by the police on strong grounds of suspicion to be engaged in a plot for blowing up the Houses of Parliament the

(1) (1865) 6 B. & S. 257, 296.
(2) 2 Ex. 167.
(3) (1870) L. R. 6 Q. B. 1, 23, 24.
(4) [1891] A. C. 272, 282.
(5) [1915] 1 K. B. 857.

Government would have no power to meet the public danger by taking measures of precaution which would as a matter of course be taken by the executive of any continental country —that it has no means of arresting them or expelling them from the country. That is an extraordinary doctrine. It is submitted that the State is not in such a helpless condition as is here suggested: see *Attorney-General for Canada* v. *Cain*. (1) Then the respondent rests his case upon statute, and it is said that the right of a foreigner to sue was first established by Magna Carta. Magna Carta forms the basis of the constitution between the King and his subjects; the foreigner is not within the ambit of the consideration passing between the parties, and if certain privileges were thereby granted to foreigners that did not entitle them to sue in the King's Courts as a matter of right. The rights and disabilities of aliens in this country have been dealt with in numerous ancient statutes. An alien could hold personal property, but until quite recent times he had no right to acquire or hold real property. That disability was, however, removed step by step by successive Acts of Parliament culminating in the Naturalisation Act, 1914. By s. 17 of that Act real and personal property may now be held by an alien in the same manner as by a natural-born British subject. That Act, however, contains no provision as to the right to sue, and by a proviso to s. 17 it is expressly enacted that the section shall not operate to entitle an alien to any rights or privileges as a British subject except such rights and privileges in respect of property as are thereby expressly given to him. With the growth of the common law recourse to the King's Courts was gradually accorded to aliens as persons living in temporary allegiance to the Crown, but their position in this matter was one of toleration and permission rather than of strict right. Their right to sue depended upon the implied permission of the Crown to use the King's Courts; it has not the same quality as the right of the King's subjects and the protection granted to an alien does not extend to challenging the actions of the King's Executive by

(1) [1906] A. C. 542.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR.

proceedings in the King's Courts. It is conceded that if a tort is committed against a British subject the wrongdoer cannot plead as a defence that the wrongful act was an act of State, for, it is said, the King can do no wrong, and it follows that he cannot authorize a wrong, and therefore his officers are liable as private persons. But this maxim applies only as between Crown and subject. In the case of an alien there is no enforceable limitation upon the absolute power of the King and complaints of the action of the State can be remedied only by diplomatic measures taken by the alien's Government. The constitutional right of suing an officer of the Crown for an act done under the direction of the Crown is a limitation of the Royal Prerogative for the benefit of the subject and cannot be relied upon to support an action by an alien.

T. M. Healy K.C. (of the Irish and also of the English Bar) and *John O'Byrne* (of the Irish Bar) for the respondent. At the time of the acts complained of the respondent was a citizen of a friendly state living and carrying on business in Ireland with the implied permission of the Crown, and in respect of the money and cheque which have been taken from him he had all the rights of a British subject. In *Porter* v. *Freudenberg* (1) Lord Reading C.J., delivering the judgment of the full Court of Appeal, says that "alien friends have long since been, and are at the present day, treated, in reference to civil rights, as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts." The right to hold property involves the right to sue for the protection of that property. *Buron* v. *Denman* (2) has no analogy to the present case. What was there approved of by the Crown was a belligerent act committed abroad against a foreigner in the interest of humanity, and an act from which the Crown gained nothing. In *Poll's Case* (3) the question was as to the right to prevent an alien from landing. In neither case was the foreigner resident in this country. It

(1) [1915] 1 K. B. 857, 869. (2) 2 Ex. 167.
(3) 1 F. 823.

has been proved that this money belonged to the respondent, and it has been taken by the Crown. Unless statute or authority can be cited in justification of the appellant's act it would be the gravest peril to put into the hands of any official the power to seize the property of an alien amy resident in this country. Nothing like this has ever before been done in the history of our law. The contention that the respondent is an alien enemy is not open to the appellant, because it has not been pleaded, and the Crown took no steps, as it could have done, to revoke its implied permission to the respondent to reside in this country. If the high doctrine contended for by the appellant prevails the proper course was to have moved to take the writ off the file. Instead, the Crown Solicitor agreed to accept service on behalf of the Chief Commissioner of Police and from that moment the action was properly brought. The ratification, which was not issued until months after the action was brought, should have been pleaded. After the Crown Solicitor had accepted service and had designated the defendant, to issue this ratification on the eve of the trial was to lay a trap for the plaintiff—a friendly alien who had already been punished once for his offence. Neither the Crown nor any of its officers has any right to appropriate or confiscate the respondent's property in the manner adopted in the present case.

Serjeant McSweeney replied.

[The following authorities were also referred to: *Rex* v. *Speyer* (1); *Rodriguez* v. *Speyer* (2); *Bradlaugh* v. *Clarke* (3); *Attorney-General* v. *Trustees of the British Museum* (4); and as to the definition of an act of State, Pollock on Torts, 11th ed., p. 112; and Stephen's History of the Criminal Law, vol. ii., pp. 61–65.]

The House took time for consideration.

1921. June 24. VISCOUNT FINLAY. My Lords, the appellant in this case is the Chief Commissioner of the Dublin

(1) [1916] 2 K. B. 858.
(2) [1919] A. C. 59, 84.
(3) (1883) 8 App. Cas. 354, 358.
(4) [1903] 2 Ch. 598.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Viscount Finlay.

Metropolitan Police. He was the defendant in an action in which the respondent sued for the detention of 124*l.* in cash and a cheque for 4*l.* 15*s.* 6*d.* The respondent was convicted of being engaged in illegal drilling and there was found upon him at the time of his arrest the cash and cheque now claimed. The respondent is a naturalised citizen of the U.S.A. and the detention is alleged by the appellant to be an act of State. A certificate given by the Chief Secretary for Ireland was put in at the trial and is as follows: "It appearing that Richard H. Boyle, Inspector of the Dublin Metropolitan Police, on 1st May 1918, arrested one William Pedlar (an alien) at Blackrock, co. Dublin, on a Warrant dated the 1st May 1918, signed by Mr. Swifte, K.C., Divisional Justice, for an offence under the Defence of the Realm Act, and that the said Inspector Boyle searched the said William Pedlar after said arrest, and that there were found upon him (*inter alia*) a sum of 124*l.* cash and a cheque for 4*l.* 15*s.* 6*d.*, both of which were taken and detained by an officer of the Crown (who still detains same) as an Act of State for the Defence of the Realm and for the prevention of crime. Now, I, the Right Hon. Ian MacPherson, M.P., Chief Secretary for Ireland, in my capacity as a Minister of the Crown and officer of State and official superior of the said officer, do hereby formally ratify, adopt and confirm the said seizure of the said cash and cheque and the detention of same by the said officer on the grounds aforesaid. Dated this 19th day of June 1919. (Signed) IAN MACPHERSON."

The action was tried before Pim J., with a jury. The learned judge, after argument, directed the jury to find for the defendant. The Divisional Court, consisting of Dodd, Gordon and Moore JJ., dismissed a motion on behalf of the plaintiff that the verdict and judgment should be set aside. The Court of Appeal were divided in opinion. The Master of the Rolls held that the appeal should be dismissed, being of opinion that the plaintiff was in the position of an alien enemy and that no action was maintainable in respect of the seizure of the cash and cheque, as that had been adopted by the Crown as an act of State. Ronan and O'Connor L.JJ.,

however, held that as a subject of a State at peace with His Majesty, the plaintiff was in the position of a friendly alien, against whom the defence of act of State could not be raised. In accordance with the opinion of the majority of the Court the appeal was allowed and judgment was entered for the plaintiff for 124*l.* and the delivery up to him of the cheque.

On the present appeal your Lordships are asked to restore the judgment of Pim J.

The plaintiff was born in Ireland. When very young he went first to Glasgow and afterwards to America, where he was naturalised as a citizen of the U.S.A. in January, 1916. In March of the same year he returned to Scotland and thence to Ireland, and took part in the rebellion of 1916 in Dublin. He was deported to Frongoch and on his release in May, 1917, returned to Ireland and continued to reside there. On May 1, 1918, he was arrested on a charge of illegal drilling. He was convicted and remained in Belfast gaol under sentence for six months. When he was arrested he had with him the money and cheque, which were seized by the police. When he was in gaol his solicitor wrote to the Chief Commissioner asking that the money should be returned to his wife. He was informed by letter of September 2, 1918, that the Chief Commissioner was advised that the money should be retained for the present by the police. The present action was then brought by a writ dated November 15, 1918.

The statement of claim alleged detention and conversion of the cash and cheque and claimed their return and damages.

The statement of defence was delivered on December 18, 1918, and was as follows: "1. The Defendant denies each of the several acts in the Statement of Claim alleged. 2. The Defendant denies that the money or cheque mentioned was, or is, the property of the Plaintiff as alleged. 3. The Defendant says that the said monies and cheque were the property of an illegal association and were in Plaintiff's possession for the illegal purpose of the said association at the time of the acts complained of. 4. The Plaintiff is an alien and the said monies and cheque were taken and detained

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Viscount Finlay.

by an Officer of the Crown by the direction of the Crown as an Act of State for the Defence of the Realm and for the prevention of crime, which is the detention and conversion complained of." The following particulars were delivered under para. 3: "The plaintiff was a member and organiser of an association by whatever name known whose objects were to arm and drill disaffected persons in Ireland in order to promote resistance to lawful authority by force and violence, and the monies mentioned were the monies of said association in Plaintiff's possession for the purpose of organising the arming and drilling of the members of the association as aforesaid."

A motion was made on behalf of the plaintiff to have the words alleging that the plaintiff was an alien struck out from para. 4 of the defence. The substantial question which this motion was intended to raise in a summary way was that it was immaterial that the plaintiff was an alien, as he was in Ireland and a citizen of a State at peace with His Majesty. This motion was refused by order of January 28, 1919.

On February 11, 1919, the plaintiff's reply was delivered joining issue and submitting that para. 4 of the defence was bad in law.

The certificate of the Chief Secretary which I have already set out was given on June 19, 1919, and the trial took place before Pim J., with a common jury, on July 3.

The plaintiff was called as a witness. He proved the facts as to his history which I have already stated. In the course of his evidence he stated that he was a member of the Clan na Gael; that the money did not belong to that or to any other organisation; that the 100*l.* was a grant or loan made to him by the National Aid Association, which was an organisation for assisting those who had taken part in or were victimised for the part they had taken in the rebellion of 1916; that the grant was made by cheque, which he cashed, getting in exchange a banknote for 100*l.*, part of the money taken by the police; and that the other money seized formed part of his earnings in business in Ireland. He admitted that he had been engaged in drilling and that he had advised

the men to have bicycles, and that he did say that "they might be able to get arms, that there were chances."

The Crown Solicitor was called, and produced the certificate of the Chief Secretary above set out.

Pim J. asked the jury whether the sum of 124*l.*, or any part of it, was the property of the plaintiff. The jury answered "Yes" as to the 24*l.*, but could not agree as to the balance of 100*l.* As directed by the learned judge, they found a verdict for the defendant, but in the Court of Appeal, as I have said, judgment was entered for the plaintiff.

The case turns upon the question whether the defence of "Act of State" is available as against the present plaintiff. Para. 3 of the defence was not proved.

It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.

This rule of law has, however, been held subject to qualification in the case of acts committed abroad against a foreigner. If an action be brought in the British Courts in such a case it is open to the defendant to plead that the act was done by the orders of the British Government, or that after it had been committed it was adopted by the British Government. In any such case the act is regarded as an act of State of which a municipal Court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means. This was established in 1848 in the well-known case of *Buron* v. *Denman*. (1) The defendant in that case, Captain Denman, was a British naval officer engaged on the coast of Africa in measures for the suppression of the slave trade. The plaintiff was a Spaniard engaged in that trade. The acts in respect of which the

(1) 2 Ex. 167.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Viscount Finlay.

action was brought were the destruction by the defendant of the barracoons in which the plaintiff kept slaves for shipment and the release of the slaves. The case was tried at Bar, and the summing up was delivered by Parke B. He laid down the law with regard to acts of State as I have above stated it, and the jury found for the defendant.

This doctrine has no application to any case in which the plaintiff is a British subject. If authority be wanted for the proposition that a British subject's right of action for any wrong to his person or property is not subject to this qualification with regard to acts of State it is enough to refer to the case of *Walker* v. *Baird*. (1) In that case the officers of the Crown had, with the authority of the Government, seized a lobster factory in Newfoundland belonging to British subjects. An action was brought in the Courts of Newfoundland against the officers engaged. The Superior Court of Newfoundland held that, in an action of this description, in which the plaintiffs are British subjects, for a trespass within British territory in time of peace, it was no answer to say in exclusion of the jurisdiction of the municipal Courts that the trespass was an act of State. An appeal to His Majesty in Council was dismissed. Lord Herschell said (2) that the suggestion that these acts could be justified as acts of State was wholly untenable.

The cases in which the defence of "Act of State" has hitherto been recognized, have been cases in which the acts complained of were committed out of British territory. The plaintiffs have been foreigners, and no question arose as to their being in any sense subjects of the British Crown, as it might have arisen if the wrongs complained of had been done in British territory. An alien in British territory is normally regarded as a British subject for the time being in virtue of local allegiance, and it is for this reason that in dealing with the defence of "Act of State" it is often said that the act must have been abroad as well as against a foreigner in order that the defence should succeed.

The plaintiff is not a subject of the British Crown, but he

(1) [1892] A. C. 491. (2) Ibid. 497.

was, at the time of his arrest, within British territory. It was contended for him that he must be treated for the purposes of the present case as a British subject, inasmuch as he was at the time resident in Ireland. Hale, in his Pleas of the Crown (vol. i., p. 542), after discussing a statute of Henry VIII. giving to any of the King's subjects whose goods have been taken away the right to a writ of restitution on conviction of the thief, says: "Though the Statute speak of the King's subjects, it extends to aliens robbed; for though they are not the King's natural born subjects, they are the King's subjects, when in England, by a local allegiance." The subject of a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance, and may be convicted of high treason in respect of acts committed here.

The proposition put forward on behalf of the appellant was that residence in this country does not put an alien in the same position as a British subject in respect of acts of State of the Government, and does not entitle him to bring an action against a tortfeasor, whose act has been ordered or adopted by the Government.

I am quite unable to accept this proposition as a correct statement of our law. On such a view of the law aliens in this country instead of having the protection of British law would be at the mercy of any department entitled to use the name of the Crown for an "Act of State." It would have effects upon aliens in this country of a far-reaching nature as to person and property. If an alien be wrongfully arrested, even by order of the Crown, it cannot be doubted that a writ of habeas corpus is open to him, and it would be surprising if he has not the right to recover damages from the person who has wrongfully imprisoned him. He has corresponding rights as regards his property. I am unable to find any ground either of principle or of authority for a proposition so sweeping, which would profoundly modify the position in this country of many aliens whose conduct, while resident here, has been quite without reproach.

But it does not necessarily follow that an alien who

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Viscount Finlay.

abuses for treasonable purposes the permission of the Crown to reside in this country, will still be at liberty to claim the rights of a British subject as against the servants of the Crown who have carried out any act of State affecting him or his property. While he is in this country the alien as a matter of law is in the allegiance of the Crown, and he cannot get rid of this "local allegiance" so as to acquire while here any immunity for crimes committed against the State. But it would be a somewhat startling proposition that an alien who is engaged in acts of rebellion can claim as against the Crown or its agents that he enjoys the immunity of a British subject in respect of acts of State. While repudiating all the obligations can he retain as between himself and the Crown all the benefits attaching to the status of a British subject? One who is by birth or by naturalisation a British subject and commits treason still, of course, remains for all purposes a British subject, and must be treated as such in every respect. But the alien in this country remains an alien still, although for the time also a British subject in virtue of local allegiance. If he be guilty of treasonable acts, can he be permitted to assert for his own benefit, against the servants of the Crown, the status of a subject of the Government which he is endeavouring to subvert?

Prima facie the subject of a State at peace with His Majesty is, while resident in this country, entitled to the protection accorded to British subjects, but if it be proved in the Court before which the question arises that the alien is by overt acts showing that he is in active hostility to the Government, though he does not thereby lose the protection of the law for his person and property as against private individuals, can he further claim all the privileges of a British subject as against the Crown and its servants?

These questions may arise in some other case. They cannot be decided in the present. I have touched upon them to show that the decision of the Irish Court of Appeal in this case does not necessarily involve consequences which might be described as "fantastic." But no such defence has been attempted in the case now under appeal. There is no

allegation in the defence that the plaintiff was concerned in treasonable acts while in Ireland. Para. 4 of the defence is confined to the assertion that he is an alien, and is bad in law. This is not a mere matter of pleading. We were informed by the counsel for the appellant that he had advisedly taken up the position that an allegation of alienage was a good defence to an action in respect of an act of State in Ireland. There may have been serious difficulties which prevented the defendant from taking on himself the burthen of proving treasonable acts by the plaintiff while in Ireland. But the defence of act of State cannot be made good as to acts in the King's Dominions on a bare averment that the plaintiff is an alien.

It follows that this appeal must be dismissed with costs.

VISCOUNT CAVE. My Lords, counsel for the appellant contended for the broad proposition that, where the personal property of an alien friend resident in this country is seized and detained by an officer of the Crown, and his act is adopted and ratified by the Crown as an act of State, the alien is without legal remedy. In my opinion this proposition cannot be sustained.

When a wrong has been done by the King's officer to a British subject, the person wronged has no legal remedy against the Sovereign, for "the King can do no wrong"; but he may sue the King's officer for the tortious act, and the latter cannot plead the authority of the Sovereign, for "from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong": *Tobin* v. *The Queen* (1); *Feather* v. *The Queen*. (2) On the other hand, where the person injured is an alien resident abroad, the above rule does not apply; and if the act causing the injury is adopted by the Sovereign as an act of State, the alien is without redress except by diplomatic action taken through the Government of his own country: *Buron* v. *Denman* (3); *Secretary of State for India* v. *Kamachee Boye Sahaba*. (4)

(1) (1864) 16 C. B. (N. S.) 310.
(2) 6 B. & S. 257, 295.
(3) 2 Ex. 167.
(4) (1859) 13 Moo. P. C. 22.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Viscount Cave.

But there is a third case—namely, where the person aggrieved is an alien ami resident here; and I think that it is the established law that such a case falls within the first and not within the second of the above categories. In early times an alien had no rights in public law, and in private law his rights were much restricted. It was laid down by Littleton (s. 198) that an alien could bring no action, real or personal, but as regards an alien ami this proposition was disputed by Coke, who said: "In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the King, and one that is subject to one that is in league with the King; and true it is that an alien enemie shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is, untill both nations be in peace; but an alien that is in league, shall maintain personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions": Co. Litt. 129*b*. Certainly Littleton's rule was not recognized by the law merchant or in Chancery; and before the end of the sixteenth century it was established that at common law an alien friend could own chattels and sue on a contract or in tort in the same manner as a British subject: Dyer 2*b*. No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given: *Musgrove* v. *Chun Teeong Toy* (1); and having landed, he may be deported, at least if a statute authorizes his expulsion: *Attorney-General for Canada* v. *Cain* (2); and see *In re Adam.* (3) But so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations: Hale's Pleas of the Crown, vol. i., p. 542; *Calvin's Case* (4); *De Jager* v. *Attorney-General of Natal* (5); *Porter* v. *Freudenberg:* per Lord Reading C.J. (6),

(1) [1891] A. C. 272.
(2) [1906] A. C. 542.
(3) (1837) 1 Moo. P. C. 460.
(4) (1608) 7 Rep. 6*a*.
(5) [1907] A. C. 326.
(6) [1915] 1 K. B. 857, 869.

including the right to sue the King's officer for a legal wrong.

Some observations by Lord Kyllachy in *Poll* v. *Lord Advocate* (1), if taken generally, might appear to be inconsistent with this view; but they were directed to the case of an alien who had been prevented from landing in Scotland and not to that of an alien resident there.

Further, an alien resident in this realm is entitled by statute to hold personal property here in the same manner in all respects as a natural-born British subject: British Nationality and Status of Aliens Act, 1914, s. 17; and it would be a serious derogation from that right if it were held that his property might be seized by an agent of the Crown without legal authority and without redress.

The above observations are sufficient to cover the present case, which your Lordships were invited to determine on broad lines. If it were necessary to go into the particular facts of this case, it would have to be considered whether the seizure by a police officer of money found on a person arrested within the realm can properly be described, even though ratified by a Minister, as an "act of State." It has been said that such an act must be done outside British territory: Cobbett's Leading Cases, vol. i., p. 18; see *Musgrave* v. *Pulido* (2), and again that the expression "act of State" denotes "a catastrophic change constituting a new departure": per Moulton L.J., in *Salaman* v. *Secretary of State for India* (3); but it is unnecessary in the present case to determine whether the meaning of the term is so restricted. It is enough to say that in this case the defence of "an act of State" cannot prevail.

I should add that the judgment of O'Connor M.R. in the Court of Appeal was mainly founded upon the view that the right of a resident alien to protection is contingent on his observing the duty of allegiance while in the realm, and that the respondent, having been guilty of treasonable acts, had thereby forfeited his right to the protection of the King's

(1) 1 F. 823, 827–8. (2) (1879) 5 App. Cas. 102, 112.
(3) [1906] 1 K. B. 613, 640.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Viscount Cave.

Courts. But this question was not raised in the defence, and (either for that reason or because a decision on the wider question was desired) was not seriously argued in your Lordships' House, and accordingly I think it best to express no opinion upon it.

For the reasons given above I am of opinion that this appeal fails and should be dismissed.

LORD ATKINSON. My Lords, it does not appear to me that the defendant either in the fourth paragraph of his statement of defence, or in the evidence given at the trial, or in the argument addressed on his behalf to your Lordships on the hearing of this appeal, ever meant to insist that the Crown or the defendant, on behalf of and by the authority of the Crown, had the right to acquire the beneficial interest in the money taken from the plaintiff.

The right relied upon was the right by virtue of an act of State, and for the defence of the realm to take possession of and detain the respondent's property. Observations, therefore, as to absence of any right in the Crown to confiscate the property of a subject or of a friendly alien living within the realm, or as to the necessity for inquisition and office found to entitle the Crown to the ownership of property appear to me to be rather irrelevant.

It is on the authorities quite clear that the injury inflicted upon an individual by the act of State of a sovereign authority does not by reason of the nature of the act by which the injury is inflicted cease to be a wrong. What these authorities do establish is that a remedy for the wrong cannot be sought for in the Courts of the sovereign authority which inflicts the injury, and that the aggrieved party must depend for redress upon the diplomatic action of the State, of which he is a subject.

The best definition, I think, of an act of State, as well as the descriptions of the consequences flowing from it, is that given in the judgment of Lord Kingsdown in the case of *Secretary of State for India* v. *Kamachee Boye Sahaba*. (1)

(1) 13 Moo. P. C. 22.

In that case, the Rajah of Tanjore, a native independent sovereign, who was, by virtue of certain treaties, under the protection of the East India Company, died without leaving issue male. Thereupon, the East India Company, in exercise of their sovereign power and in trust for the British Government, seized the Raj of Tanjore and the whole property of the deceased rajah as an escheat, on the ground that the dignity of the raj was extinct for want of a male heir, and that this property lapsed to the British Government. It was held first, as it was held in *Buron* v. *Denman* (1), that an act done by an agent of the Government, though in excess of his authority, on being ratified and adopted by the Government, was of the same authority as if it had originally been directed by the Government, that the effect of the ratification is, in the language of Parke B. in *Buron* v. *Denman* (2), this, that it only leaves a remedy against the Crown (such as it is), and exempts from all liability the person who commits the trespass, and, second, that the seizure made by the British Government acting as a sovereign power through its delegate, the East India Company, was an act of State to inquire into the propriety of which a municipal Court had no jurisdiction. Lord Kingsdown, in delivering the judgment of the Privy Council, said (3): "Acts done in the execution of these sovereign powers were not subject to the control of the municipal courts, either of India or Great Britain." He cites several authorities in support of this proposition, and then proceeds: "The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title to the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up" (*i.e.*, that the seizure was an Act of State), "of course, has no foundation."

(1) 2 Ex. 167. (2) Ibid. 188–9. (3) 13 Moo. P. C. 77, 86.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Atkinson.

He then proceeds: "If there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent, which according to the principle of the decision in *Buron* v. *Denman* (1) is equivalent to a previous authority. The result, in their Lordships' opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy."

That statement has been many times approved of, especially in *Musgrave* v. *Puledo* (2) and *Cook* v. *Sprigg*. (3)

In this latter case the paramount Chief of Pondoland had granted certain valuable concessions to the plaintiffs, including mineral rights and forest lands, certain railway and trading rights, etc. The grantees had spent large sums in developing the property so granted. Pondoland was annexed by Her Majesty Queen Victoria, and the action was brought against the Prime Minister of Cape Colony for a declaration that as against the Crown the plaintiffs were entitled to the property so granted to them, and for 5000*l*. damages sustained by them by reason of the defendant's interference with them in the exercise and enjoyment of their claimed rights.

Lord Halsbury delivered the judgment of the Judicial Committee, composed of Lords Watson, Hobhouse, Macnaghten and Morris and himself. He said (4): "It is a

(1) 2 Ex. 167.
(2) 5 App. Cas. 102, 112.
(3) [1899] A. C. 572.
(4) Ibid. 578.

well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property should be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure."

He then quotes with approval the second passage from Lord Kingsdown's judgment which I have already quoted.

The last words of Lord Halsbury's judgment clearly suggest that the Government of this country cannot assert as a defence against one of their own subjects that an act done to the latter's injury was an act of State, since such a subject clearly could not rely on his own sovereign bringing diplomatic pressure against himself to right the subject's wrong. In conformity with this principle it was held in *Walker* v. *Baird* (1) that where the plaintiffs are British subjects in an action for trespass committed within British territory in time of peace it is no answer that the trespass was an act of State, and that thereby the jurisdiction of the municipal Courts was ousted. And even where the person aggrieved was an independent rajah, against whom the East India Company made war, and having made him prisoner, seized his property, it was apparently considered by Sir John Romilly M.R., in *Ex-Rajah of Coorg* v. *East India Company* (2), that the company, notwithstanding that this act was an act of State,

(1) [1892] A. C. 491. (2) (1860) 29 Beav. 300.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Atkinson.

could have been sued in respect of any property seized by them which belonged to the rajah in his private capacity as his personal property and not in his character of rajah.

The case of *Sirdar Bhagwan Singh* v. *Secretary of State for India* (1) is a good example of a case falling within the second member of Lord Kingsdown's definition of an act of State. The question remains whether a friendly alien resident within Great Britain with the implied permission and under the protection of the Sovereign is in respect of acts of State in the same position as a British subject, with many of whose rights he is under the existing state of the law undoubtedly clothed.

The following three Irish cases, in each of which the plaintiff was a British subject, would at first sight appear to establish that an act of State can be pleaded by the Crown as a defence to an action brought by a subject for a wrong done to him. The cases are *Napper Tandy* v. *Lord Westmoreland* (2); *Luby* v. *Lord Wodehouse* (3); and *Sullivan* v. *Earl Spencer*. (4) In the second of these cases it was urged, and apparently to some extent admitted, that the first was badly reported. I therefore confine my remarks to the second and third of them. The second was an action of trespass brought against the Lord-Lieutenant (a Viceroy, not as in *Musgrave* v. *Pulido* (5) merely a Governor) while he held that position for an act of State alleged to have been directed by him personally in discharge of the duties of his office. The third was an action for assault, also brought against a Lord-Lieutenant personally while he was Lord-Lieutenant for injuries received by the plaintiff in the dispersal of a public meeting which it was alleged the Lord-Lieutenant had in discharge of the duties of his office personally directed to be dispersed. In each case it was decided that an action cannot be brought in an Irish Court against an existing Irish Viceroy personally for an act done by him while he was Viceroy in the discharge of the duties of his office, and the

(1) (1874) L. R. 2 Ind. App. 38.
(2) (1792) 27 St. Tr. 1246.
(3) (1865) 17 Ir. C. L. Rep. 618.
(4) (1872) I. R. 6 C. L. 173.
(5) 5 App. Cas. 102.

writ was in each case ordered to be taken off the file. The cases turned upon the fact that the Lord-Lieutenant was sued personally and were decided on the ground that he could not be so sued for his administrative act in the Court of the country of which he was the Viceroy. I do not think, therefore, that these cases are in conflict with *Walker* v. *Baird*. (1)

By the common law of this country an alien enemy has no rights. He could be seized or imprisoned and could have no advantage from the laws of this country. He could not obtain redress for any wrong done to him in this country: *Sylvester's Case*. (2) The Crown may no doubt grant a licence to an alien enemy to reside in this country, which imports a licence to trade here, but in the absence of such a licence the property of an alien enemy may be seized for the use of the Crown: *The Johanna Emilie*. (3) But while in this country with a licence any alien enemy may bring an action: *Wells* v. *Williams* (4); *Janson* v. *Driefontein Mines*. (5) A mere non-interference with an alien enemy does not imply a licence to reside and trade. It is necessary for him to show that he resides in this country with the full knowledge and sanction of the Government: *Boulton* v. *Dobree*. (6) Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it: 1 Blackstone, 259; *Attorney-General for Canada* v. *Cain*. (7) And at any time the Crown may revoke its licence expressed or implied to an alien to reside: *The Hoop*. (8) In Vattel, Book 2, s. 108, it is stated that a friendly alien can at any time leave the country, the Government have no right to detain him, except for a time and for very particular reasons, as, for instance, the apprehension in war, lest such foreigners acquainted with the state of the country and of the fortified places should communicate knowledge to the enemy.

A friendly alien resident in this country can undoubtedly

(1) [1892] A. C. 491.
(2) (1702) 7 Mod. 150.
(3) (1854) 2 Eng. P. C. 252.
(4) (1697) 1 Ld. Raym. 282.
(5) [1902] A. C. 484, 506.
(6) (1808) 2 Camp. 163.
(7) [1906] A. C. 542.
(8) (1799) 1 C. Rob. 196, 199.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Atkinson.

be prosecuted for high treason: *De Jager* v. *Attorney-General of Natal* (1), because it can then be averred that he acted contra ligentiæ suæ debitum: *Calvin's Case.* (2)

For the same reason an alien enemy can be prosecuted for high treason if he has accepted the protection of the Sovereign, but not otherwise: Foster, 185.

I cannot find any authority for the proposition that if the property of a friendly alien resident in this country under the protection of the Crown and not violating in any way the allegiance he owes to the Crown which protects him be seized and detained by an act of State of the sovereign authority the alien cannot sue the officer of the Crown by whose act he is aggrieved in one of the municipal Courts of the country. The major proposition for which the Crown contends, that in such a case the alien could not sue here, is not, I think, sustainable. No authority was cited in support of it and it is not in harmony with the principles laid down in many cases as to the rights of a friendly alien such as I have described. The respondent in the present case is in a position wholly different from the friendly alien whom I have mentioned. The question is does his conduct deprive him of the remedy which would be open to a well conducted friendly alien resident peaceably within the realm?

I concur in the careful judgment of the Irish Master of the Rolls save as to what he says in the last four lines of it. These lines run thus: "I refuse to treat the Plaintiff in this action, who seeks to enforce civil rights, as an alien friend. I treat him as an alien enemy, and, in my opinion, his action ought to be dismissed." I cannot think that under the circumstances of this case the conclusion of the Master of the Rolls is sound.

It is true that the respondent flagrantly violated his allegiance. It is true that he abused the rights which the protection of the King secured for him. It is true that he might presumably have been tried for high treason. It is certain that he might have been expelled from the country. But none of those things have been done. The protection to

(1) [1907] A. C. 326. (2) 7 Rep. 6*b*.

a resident alien is given by the Crown. The Crown alone can withdraw it. The appellant is still the subject of a State at amity with Great Britain. He does not come within the definition of an alien enemy, and the Crown has given no indication whatever that it has withdrawn his implied licence to reside within this realm. The fact that he has shown himself unworthy of the Sovereign's protection, has abused his privileges and violated his allegiance, cannot, in my view, ipso facto terminate the protection with all the rights which flowed from it which the Sovereign extended to him, or ipso facto withdraw the implied licence which the Sovereign gave to him to reside in this country.

The internment of the respondent was a measure of precaution against the commission of crime or of disloyal action. It was not a punishment for crime that had been committed, and it did not operate as a revocation of the implied licence he had to remain in this country : *Schaffenius* v. *Goldberg.* (1)

He states in his evidence, which is uncontradicted, that he took part in the rebellion in 1916 in Dublin. It does not appear that any proceedings were ever taken against him for that crime. It does appear that he was interned in Frongoch (why, is not stated) and was released at Christmas, 1916, that he returned to Ireland in March, 1917, and was again deported, this time to Oxford ; that he was released in May, 1917, returned to Ireland, and after an entire year's residence there, was arrested in May, 1918, for illegal drilling, and was prosecuted, convicted and sentenced to four months' imprisonment, so that from April, 1916, when the Irish rebellion took place, till May 18, 1918, about two years, he was only absent from Ireland for about nine months. During the rest of the time he was resident in Ireland, his presence being apparently as little objected to by any of the Government authorities as that of any ordinary citizen, though they must, I think, be taken to have been aware of his presence.

There was no evidence given to show that he had in his possession the money taken from him for the purpose of procuring the commission of crime. Under these circumstances

(1) [1916] 1 K. B. 284.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Atkinson.

I think it is impossible to treat the appellant as an enemy alien resident in this country without the express or implied licence of the Crown. I think, on the contrary, he must be treated as a friendly alien resident in the month of May, 1918, in this country with the implied licence and permission of the Crown, and clothed with all the rights the protection of the Crown gives him.

I cannot find any authority which justifies the taking from a man in the position, which I think the respondent occupied at the date of his arrest, of the money found upon his person and detaining it, and if that be so, it follows, from *Porter* v. *Freudenberg* (1), and the many authorities therein cited, that the respondent is entitled to sue for and recover his money.

I therefore think the appeal fails, and should be dismissed with costs.

LORD SUMNER. My Lords, unless and until the Chief Secretary purported to ratify the appellant's conduct this was admittedly an undefended action of tort, but it is said that this ratification on behalf of the Crown affords a good defence. That the contention is anomalous and unsupported by authority counsel frankly admitted. When Pedlar issued his writ, he was still no worse off than a British subject would have been, and this defence could never have been raised at all if he had not become a citizen of the United States of America. There may be some poetic justice in such a result, for the respondent was naturalised in January, 1916, on his own statement that he meant to reside permanently in the United States, but in March was resident in Glasgow and in April was a rebel in arms in Dublin, and even after regaining his liberty he did not use it to return to America. The question, however, is whether this result is according to law.

In 1844 the law, as generally understood, was clear, that an alien amy could bring all personal actions in English Courts, and was liable to actions and to prosecutions as if he were a subject born. He was under certain disabilities

(1) [1915] 1 K. B. 857.

as to holding property, and, of course, was under many political and public disqualifications. It is true that this view of the law mainly rested upon statements made by institutional writers and not upon actual decisions, but they were of high and often of the highest eminence, and their tenor was uniform. That a difference existed between the alien's right of suit, when the Crown could be said to have an indirect concern in the defence, and that right, when the Crown had none, was nowhere decided, for it had never arisen for decision, but, I think, it would be too much to assume that the point can be treated as open now. If your Lordships have now the power to declare the law to be subject to an exception, hitherto unnoticed or unsuspected, and if all the authoritative statements of it made since the Stuarts first came to the throne have been unconsciously defective and incomplete, I am sure that it is a power not to be exercised except under the constraint of convincing and unanswerable argument.

The question has been treated very ingeniously as depending on the legal theory, which underlies the rights of action of the alien amy, such as they are, and their wide scope is admitted. As a judicial reason for recognizing the right of the alien amy to the same position before a Court as that of a subject, in so far as the defence of his rights may require, I think Lord Coke's words are entirely satisfactory—"an alien that is in league shall maintain personal actions; for an alien may trade and traffic, buy and sell, and therefore of necessity he must be of ability to have personal actions." How far, as a commentary on the text of Littleton (s. 198), this represents the law or the reason for it in Littleton's time is another matter, but, taking the law as he found it in his own, I think Lord Coke gives a better explanation of it than any other. No writer or judge, so far as I know, has ever advanced the appellant's theory—namely, that the real origin of these rights is to be found either in the grace of the Crown, permitting aliens to sue subjects so long as the Crown does not think fit to intervene but permitting them thus far and no farther, or in some constitutional struggle, quite

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Sumner.

unrecorded, by which aliens wrung these conditional rights from a reluctant sovereign, but failed to obtain all that subjects had previously obtained.

In 1844 an Act (7 & 8 Vict. c. 66, s. 4) was passed, which enacted that an alien amy "shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom." By the next section capacity was given to hold lands for twenty-one years. It is plain on the language of this Act (and the history of the legislation fully confirms it) that it was an amending Act, dealing with the two respects in which for private purposes the position of an alien amy was less advantageous than that of a subject born. The Naturalisation Act of 1870 and the British Nationality and Status of Aliens Act, 1914, have since completed this emancipation, giving the alien power to hold and dispose of all kinds of property (British ships always excepted) in the same manner in all respects as a natural-born subject. I think that the Legislature thus recognized a pre-existing equality for private purposes between the alien amy and the subject born, except for those disabilities as regards the holding of property, which it proceeded by successive steps to remove. The Act says, in effect, that this respondent is entitled to hold and dispose of his money, as if he had never ceased to be a British subject; the appellant says that he is not; that, on the contrary, he, the appellant, is entitled to hold it indefinitely, and so to prevent the respondent from disposing of it by delivery; that at most the barren title remains to the respondent as its owner. The result is that, till the Chief Secretary intervened, Pedlar, the citizen of the State of Pennsylvania, held that property in the same manner as Pedlar, the British subject, would have held it, which is what the Act says; but that, after that intervention, he held it quite otherwise—namely, precariously, and only so far as the Crown might suffer him to

enjoy it. The point that these Acts do not name the Crown and so do not affect its rights, in my opinion, does not arise. No claim is made here to prevent the Crown from ratifying the respondent's action in detaining the money, but only to prevent the respondent from personally pleading that ratification as an effective defence to a private wrong, which he has committed personally. The rights of the Crown remain unaffected, but their exercise is less beneficial to Colonel Johnstone than might otherwise have been the case. I think that is all.

The language of Lord Kyllachy in *Poll* v. *Lord Advocate* (1) was relied on as supporting the appellant's contention, which doubtless in terms it seems to do. The words are "except in a question with its own subjects, the sovereign power—the supreme executive—of every state, must be held to be absolute. . . . . An alien . . . . cannot sue the state, or the head of the state; at least he cannot do so in respect of a wrong done or threatened in the national interest," and, more important still, the plea sustained by the judgment was in these words, "no action lies in the courts of this country at the suit of a foreigner, either against the Crown or the servants of the Crown in respect of an act of state by command of Her Majesty's Government." The actual issue raised and decided in that case is not germane to the present appeal. It is not disputed that no alien is entitled as of right to enter the realm, from which it follows that no action lies for excluding him, and neither in *Poll's Case* (1) nor since has it been said, that by crossing the limit of territorial waters and reaching Aberdeen Harbour for a purpose which the officers of the Crown were instructed to prevent, Poll put himself in a better position than if he had been turned back at the unmarked boundary three miles out to sea. As applied to the present case both the language of the plea, which Lord Kyllachy sustained, and that of his judgment appear to me to be in conflict with the whole current of prior authority.

The appellant relied on *Buron* v. *Denman* (2), and in effect

(1) 1 F. 823, 828. (2) 2 Ex. 167.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Sumner.

contended that the rule there laid down by Parke B. is equally applicable when the alien amy is resident within the realm at the time of the acts in question and himself suffers them within the realm. They argued, as I understood, that *Buron* v. *Denman* (1) shows that the executive has, as against aliens, a general right to commit by its agents what would be actionable wrongs in private persons and, as a necessary consequence, to shelter those agents themselves from liability under the ægis of the Crown's authority. How else, it was asked, could this right be effectually enjoyed ? That Buron was injured in a savage part of Africa was an accident. Accordingly it was incumbent on the respondent to show how and when that right became limited to acts done without the realm. No constitutional change could be traced in favour of aliens, either historically or as a development of legal theory, such as that by which the King's Courts assumed or obtained jurisdiction to review the acts of his servants in favour of subjects upon the principle of the maxim that the King can do no wrong.

My Lords, the speculation is interesting but, as I think, fallacious. *Buron* v. *Denman* (1) is a case rather of the inability of the Court than of the disability of the suitor. Municipal Courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign State done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification. What the Crown does to foreigners by its agents without the realm is State action also, and is beyond the scope of domestic jurisdiction. As soon as it appeared that it was based on such an act of the Crown, Buron's claim was one which an English Court could not support, although only a subject was made party to the suit. To consider the steps by which long ago the King's Courts held that they had jurisdiction to try such claims against private persons or persons in a private capacity and to require that their acts should be justified not under the ægis of the Crown but under

(1) 2 Ex. 167.

the shield of the law is, equally with the steps by which they came to entertain any suit by an alien at all, no longer a relevant inquiry. As soon as it is found to be settled, as the law of our Courts, that they are open to aliens as well as to subjects, I think it follows that they are presumably equally open to them, so far, that is, as actions are brought in support of such civil rights as are recognized in aliens from time to time. The foundation of these rights of action is that the Courts have defined their jurisdiction so as to admit them, not that the Crown has granted a right of suit, with or without restriction on the prerogative. A historical inquiry into the steps by which alien friends were admitted to sue in the King's Courts would be of great interest, though I doubt if all the necessary material is yet available. I assume that there was a time when the goods of the alien friend were at the King's mercy. It seems to have been so at the time of the Great Charter, and even in 1295 by command of the King a sheriff seized all the wool and other merchandise of alien traders and kept them as forfeited to the King's use, and all the remedy asserted was an action for the return of the price, which the aliens had paid to the English subjects, who had sold the wool (Select Cases before the King's Council, Selden Society, 1918, p. 13). From this to *Calvin's Case* (1) is a far cry, but until the appellant can establish that the alien's right to bring the police officer to book is in the nature of a grant by the Crown or a derogation from the prerogative, the inquiry is of historic interest only.

It is to be observed that the form which the right of the Crown took in *Buron's Case*, like the plea in the present case, is a right to legalise a wrong, that is to say, a right not merely to shelter its servant from the consequences of his wrong, as might be done by pardoning him after conviction for a crime, but by its ratification to make that right which had been done as a wrong. Had Captain Denman burnt Buron's barracoons under a prior command, Buron would all along have stood face to face with the Crown, and if he was to sue at all must have sued the Crown. In an English Court that

(1) 7 Rep. 2*a*.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Sumner.

cannot be done. For action taken abroad the Crown would not be in the position of being obliged to shelter its servant but would be unassailable in respect of its own act, and no theory of a grant by the Crown of access to the Courts would touch the point, for such a grant goes only to admitting the alien to be heard not to subjecting the Crown itself to the jurisdiction. When admitted to sue in the Courts the alien would get no higher right than the subject and the subject cannot sue the Crown, but why should he get any less right ?

The appellant also laid some stress on a narrower contention—namely, that, in this case at any rate, Pedlar's hostile attitude towards the authority of the Crown and the peace of the realm disentitled him to occupy the position of a subject, if he would otherwise have enjoyed it in this litigation. Reliance was placed, as it was also by O'Connor M.R., on the passage in *Calvin's Case* (1) : " So long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other." On this foundation was raised the argument expressed in the words of the Master of the Rolls : " There is a mutuality in the obligations. . . . . Local allegiance, which gives the right to the King's protection, must of necessity be the allegiance of the individual and, if the latter refuses it, he has no claim to the rights or privileges which flow from it."

Personally, I do not think that either Lord Coke's language or the maxim to which he refers—" Protectio trahit subjectionem, et subjectio protectionem "—points to such a conclusion. The matter, which he had in hand, is the contrast between ligeantia localis, which begins no earlier than and continues no longer than the presence of the alien amy within the realm, and the lasting allegiance of the subject born. I do not think that Lord Coke conceived of it as quasi-contractual or as involving mutuality. The principle that the Sovereign can refuse the alien permission to enter the realm and that the alien has no right to enter is inconsistent with the existence of any such basis for local ligeance. It is clear that the obligation to obey the laws and that civil and criminal

(1) 7 Rep. 5*b*.

liability in case of disobedience to them are not dependent on anything in the nature of an actual grant of protection or recognition of the alien's presence or licence to him to remain, and if, his entry having been prohibited, he should contrive to enter surreptitiously and for a time be undetected, I conceive that during that interval he would still be liable to suit or prosecution for his acts done in defiance of the ordinary law. There seems, therefore, to be no foundation for the theory of mutuality, and the argument must really be either that the alien's conduct may give to the Crown a right to forfeit his protection or that it may be so inimical to the peace of the realm as to warrant exceptional action towards him under the Crown's authority and by the hands of its servants, on the principle that "Salus reipublicæ suprema lex," and because the Crown is the supreme defender of the realm.

No such case, of course, is pleaded, but, if defect of pleading were the only difficulty, as the point has been considered in at least one judgment below and was argued at your Lordships' Bar, I think your Lordships would not be bound to refuse to consider it. The plaintiff, regardless of the burden of proof on the pleadings as they stood, gave evidence against himself in chief, which, I imagine, he would not have been compellable to give in cross-examination, evidence which showed that, by his own account of it, he had been a rebel, who might justly have been sent to the scaffold for high treason. This would seem to have been mere bravado on his part, but, if he had thus proved such facts as the appellant requires to raise his contention, I do not think the respondent would have been entitled to have the contention dismissed on the mere ground that it had not been pleaded.

The necessary facts, however, are not proved. Forfeiture, if a tenable basis at all, at least involves some election made on the Crown's behalf to withdraw the alien's protection. There had been nothing of this kind before action brought. Ratification here only amounts to an indirect attempt to deprive the respondent of his money temporarily, a thing which could not have been done, except directly and permanently,

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Sumner.

when forfeitures were still legal, and since their abolition cannot be done at all. I suppose, further, that, if illegal drilling had been a felony, Pedlar would have been a convict, and an administrator of his property under the Forfeiture Act, 1870, might have been appointed who could and should have brought detinue against the appellant and, being a British subject, would have been at once entitled to succeed. There is, accordingly, no evidence that the Crown has, in fact, forfeited the plaintiff's right to protection in respect of his chattels, even if in law it could do so under any circumstances.

On the other hand, the evidence does not establish the existence in 1918 of any exigency, if such there be, to warrant the exercise of a supposed right to deal with an alien amy of hostile intentions otherwise than in accordance with the law. The prerogative of the Crown for the defence of the realm in time of war is one thing; the powers of the executive for the maintenance of order and the punishment of crime quite another. The difference does not disappear merely because the offence is an offence against public tranquillity, or because it is committed in time of war. The Executive, which holds office and wields power, thanks to the support of Parliament, ought constitutionally to seek wider powers from Parliament, if the existing law is insufficient, nor, if so, would the enactment of wider powers be refused. If it has not taken that course, we must presume that no such necessity had arisen, but that the existing powers sufficed. The acts of the Executive and its officers have to be justified within these powers as they existed. Accordingly, I agree that the appellant's second contention does not arise for decision on the present occasion.

My Lords, I will only add, without purporting to decide the question, that I share the noble and learned Viscount's doubt as to this police action being an "Act of State" under any circumstances. I think I should use a very different term, but as the question does not arise I refrain from attempting to qualify it affirmatively. I agree that the appeal should be dismissed.

LORD PHILLIMORE. My Lords, this case has merited, and has received, ample discussion; but at the conclusion I think I can put my reasons for a decision into a short compass.

When a subject sues another subject for a supposed tort, the defendant cannot plead as a defence that he did the act that is said to be a tort by authority of the King. The maxim "The King can do no wrong" is to be applied to litigation in this way: No one complained of for an act which is said to be a tort can withdraw the cognizance of that claim from the Courts of the land by averring that he did the act by command of the King; because if it was a lawful act, such averment is unnecessary, and if it was an unlawful act, he cannot be admitted to say that he was told to do it by the King. The defence set up in the present case is sometimes called the defence of an act of State. As regards this way of looking at it, I cannot put the matter better or more tersely than as I found it put in one of the reasons given by the successful plaintiffs in their case as respondents before the Privy Council in *Walker* v. *Baird* (1): "Because between Her Majesty and one of her subjects there can be no such thing as an act of State." And this proposition was finally accepted in the case of *Walker* v. *Baird*. (1)

The next matter, then, that remains for inquiry is whether the subject for this purpose must be a natural-born or naturalised subject or whether the word also comprehends a temporary subject, that is, the citizen or subject of a friendly State residing in this country. As regards such aliens, the rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character from his State. If his State is at war with ours his individual friendliness avails him nothing unless it enures to procure for him the special favour of licence from the King. If his State is in amity with ours he is considered an alien ami even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an

(1) [1892] A. C. 491, 494.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Phillimore.

alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war. By parity of reason neither does his individual hostility disentitle him to the rights conferred by law upon an alien ami, once he has entered this realm with permission from the King.

The King, however, can refuse any alien admission to the realm. This was established by the decision of the Privy Council in *Musgrove* v. *Chun Teeong Toy* (1); and that permission may in some respects be conditioned. Every State may, according to international law, make special laws regulating the acts and property of aliens within the realm. By the common law of England and Ireland an alien could not hold real estate, not even chattels real, for more than a short term. The droit d'aubaine existed in France till the Revolution. Most countries, including our own, have from time to time passed Alien Acts.

But an alien ami is never exlex, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The alien ami, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalised subject.

The only indication of a difference that I have found is that in *Walker* v. *Baird* (2), one of the judges of the Court in Newfoundland, Pinsent J., when delivering his judgment in agreement with that of the Chief Justice that the supposed defence could not avail, treating the case as the argument of a point of law, and assuming for this purpose certain facts, says that he assumes that the plaintiffs in that case are British subjects, as in fact they almost certainly were. On the other hand in *Musgrave* v. *Pulido* (3) the successful plaintiff, whose name was wholly Spanish, and against whom security for costs was obtained on the ground that he was

(1) [1891] A. C. 272. (2) [1892] A. C. 491.
(3) 5 App. Cas. 102.

resident in Venezuela, was, I think, for these and other reasons, almost certainly an alien. I may here say that I have had access to and have perused the original cases and appendices, as preserved at the Privy Council, in *Musgrave* v. *Pulido* (1) and *Walker* v. *Baird*. (2)

From these propositions it would seem to follow that an alien ami complaining of a tort is in the position of an ordinary subject, and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong, done by command of the King or was a so-called act of State.

From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance.

Then is there anything special in this case? The respondent has indeed no merits. On his own admission, he might have been tried, convicted and executed for high treason. His conduct shows evidence of much hostile feeling. He has since been expelled and rightly expelled from the country. But at the time when his money was taken from him, he was residing in the country, like any other alien, with the tacit permission of the King. He owed temporary allegiance to the King and for that reason could have been tried for high treason; but he was entitled till his trial to ordinary protection.

The case of an alien who would be refused admission to the country if his entrance had been known and who lands surreptitiously and continues to be in the country surreptitiously might give rise to other considerations. This is not such a case.

Also, I can conceive a case where an alien, though a citizen of a friendly State, might land on our shores with private hostile intent, and continue in our country with that same intent so that his whole stay was one transaction, and a continuous act of high treason. To such an alien, suing for

(1) 5 App. Cas. 102. (2) [1892] A. C. 491.

H. L. (I.) 1921 JOHNSTONE v. PEDLAR. Lord Phillimore.

a tort or possibly some particular class of tort, or possibly suing a public officer, it might be pleaded that he was disentitled to sue, or that the act was specially warranted, inasmuch as he had not the ordinary right to protection accorded by the King to an alien ami. I should not, however, like to do more than reserve my opinion till I had before me the precise language of the plea.

But, again, this is not the case before your Lordships' House. Counsel for the appellant desired to rest their case on the fourth paragrapb of the statement of defence, and in that paragraph, the only character attributed to the plaintiff is that he was an alien. For the reasons given in the earlier part of my opinion this defence cannot stand.

If it should be necessary, as counsel for the appellant suggest, that in the disturbed state of Ireland there should be special provision in respect of aliens, this must be effected by legislation. As things are this citizen of the United States is entitled to our judgment, and the appeal should fail.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, June 24, 1921.

Solicitor for the appellant: *Treasury Solicitor, for Sir Henry Arthur Wynne, Chief Crown Solicitor for Ireland, Dublin.*

Solicitor for the respondent: *Herbert Z. Deane, for Edmund J. Duggan, Dublin.*

[HOUSE OF LORDS.]

CRANE . . . . . APPELLANT; H. L. (E.)*
1921
AND
June 6.
DIRECTOR OF PUBLIC PROSECUTIONS . RESPONDENT.

Criminal Law—Mistrial—Prisoners separately indicted and tried Together—Venire de novo—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 7; *s.* 4, *sub-ss.* 1 *and* 2; *s.* 20, *sub-s.* 4.

The appellant was indicted for receiving goods knowing them to be stolen and another man was charged in a separate indictment with stealing the goods. The two prisoners were tried together and convicted:

Held (by Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Parmoor, Viscount Finlay dissenting), that the proceedings were a nullity, and that the Court of Criminal Appeal in quashing the conviction had power under the Criminal Appeal Act, 1907, to order the appellant to be tried according to law.

Reg. v. *Mellor* (1858) Dears. & B. 468 discussed.

Reg. v. *Yeadon* (1861) L. & C. C. C. 81 followed.

Order of the Court of Criminal Appeal [1920] 3 K. B. 236 affirmed.

APPEAL from an order of the Court of Criminal Appeal. (1)

The appellant was charged on an indictment with receiving certain skins knowing them to have been stolen. One Morton was charged on a separate indictment with stealing the skins and also with receiving the same. The prisoners were given in charge to the same jury and were tried together at the City of Leicester Sessions, and both prisoners were convicted and sentenced. The fact that the prisoners were not jointly indicted was not brought to the notice of the Recorder or of the counsel appearing in the case. The appellant appealed to the Court of Criminal Appeal on the grounds of misdirection and misreception of evidence. At the hearing of the appeal it was discovered that the prisoners were charged on separate indictments. The Court of Criminal Appeal ordered that the conviction and judgment on the indictment whereon the appellant was convicted be set aside

* *Present:* VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD PARMOOR.

(1) [1920] 3 K. B. 236.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR.

and annulled and that the appellant do appear at the next quarter sessions to be holden in and for the City of Leicester there to take his trial according to law and that in the meantime the appellant be admitted to bail.

The appellant claimed that a judgment of acquittal should be entered.

1921. April 21, 22, 25. *J. B. Matthews K.C.* and *Wightman Powers* for the appellant. The question is whether the Court of Criminal Appeal has jurisdiction to award a venire de novo. The gist of the complaint is that two prisoners separately indicted were given jointly in charge to the same jury and were tried together. There was consequently a mistrial, and in the olden time if this question had been considered by a Court of Error a writ of venire de novo would have been the appropriate remedy, but writs of error have been abolished by the Criminal Appeal Act and the question to be determined depends upon the question whether the Court of Crown Cases Reserved, whose jurisdiction is preserved by that Act, had power to award a venire de novo. The appellant's real grievance is that he has been convicted on evidence which would not have been admissible against him if the two prisoners had been separately tried. By s. 3 of the Criminal Appeal Act a person convicted on an indictment may appeal (*a*) on any question of law, (*b*) upon the certificate of the trial judge that it is a proper case for appeal, upon any question of fact or of mixed law and fact, and (*c*) with the leave of the Court of Criminal Appeal, against the sentence passed on his conviction. By s. 4, sub-s. 1, the Court of Criminal Appeal shall allow the appeal if they think that the verdict is unreasonable or cannot be supported on the evidence or that the judgment was wrong in law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal, and there is a proviso empowering the Court to dismiss the appeal if no substantial miscarriage of justice had occurred, notwithstanding that the point raised in the appeal might be decided in favour of the appellant. By sub-s. 2:

"Subject to the special provisions of this Act" the Court shall if they allow an appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be entered. That is what the appellant asks for in this case. The special provisions of the Act referred to in s. 4, sub-s. 2, are satisfied by the group of powers given in s. 5. By sub-s. 3 of s. 5: "Where on the conviction of the appellant the jury have found a special verdict and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the Court before which the appellant has been convicted on the effect of that verdict the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict and pass such sentence in substitution for the sentence passed at the trial as may be warranted at law." It is significant that one of the familiar grounds upon which a venire de novo used to be awarded by a Court of Error was that the special verdict was imperfect and did not find all that it required to find to enable the judge to come to a final decision, and, if the Court of Criminal Appeal was intended to have power in any case to award a venire de novo, this is the particular point at which one would have expected to find that power. But the sub-section assumes that the Court on a special verdict must find one way or the other and gives it no middle course. Then s. 20, by sub-s. 1, abolishes writs of error and the powers and practice now existing in the High Court in respect of the granting of new trials in criminal cases. The abolition of writs of error involves the abolition of the powers of the Court of Error, because it was only by virtue of a writ of error that the Court had jurisdiction. Venire de novo was a common process of a writ of error yet writs of error are in terms abolished and no jurisdiction is expressly given as to a venire de novo. On the other hand s. 20, by sub-s. 4, vests in the Court of Criminal Appeal all jurisdiction and authority formerly possessed by the Court for the consideration of Crown Cases Reserved under the Crown Cases Act, 1848, and transferred to the judges of the High Court by the

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR.

Judicature Act. It is therefore necessary to examine the Crown Cases Act, 1848, which created the Court for the consideration of Crown Cases Reserved, to see what its powers were. But before doing so it may not be irrelevant to examine the practice which led up to the passing of that Act. Writs of error were limited to errors appearing on the face of the record, but no part of the evidence appeared on the record, nor did the direction to the jury appear. Accordingly there were many cases of injustice in which a writ of error was not available to the prisoner, and the judges themselves without any statutory authority devised a means of remedying this defect. If a judge had a doubt whether he might not have wrongly construed an Act of Parliament or wrongly admitted or rejected some piece of evidence or given a wrong direction to the jury, he might at his discretion reserve the question for the opinion of the judges, who used to meet at Serjeants' Inn and debate the matter, and if it was thought that a miscarriage had occurred they used to recommend a free pardon: *Reg.* v. *Charlesworth.* (1) The Act of 1848 did little beyond giving statutory effect to this practice and improving its machinery. Sect. 1 empowered any Courts of Oyer and Terminer or Gaol Delivery or any Court of Quarter Sessions before whom a prisoner was convicted to reserve at their discretion any question of law which might have arisen at the trial for the consideration of the justices of either Bench and Barons of Exchequer, and thereupon to respite execution of the judgment on conviction or to postpone judgment until after the decision of the question of law. Sect. 2 provided for the statement of a case and authorized the said justices of either Bench and Barons of the Exchequer to hear and finally to determine such question, and thereupon to reverse, affirm, or amend any judgment given at the trial, or to avoid such judgment, or to arrest the judgment, or to order judgment to be given at some other Session of Oyer and Terminer or Gaol Delivery or other Sessions of the Peace if no judgment should before that time have been given as they should be advised " or to make such other order as justice

(1) (1861) 1 B. & S. 460, 517; 31 L. J. (M. C.) 25, 38.

may require." Those two sections are still law. Then s. 5, which has been repealed, expressly recognized writs of error as a concurrent remedy running alongside with the remedies conferred by the Act and enlarged the powers of the Court of Error upon a writ of error. In *Reg.* v. *Faderman* (1), which was the first decision under the Act of 1848, it was held that the Court for the Consideration of Crown Cases Reserved had no jurisdiction to review a judgment of the trial judge against the prisoner upon a general demurrer to the indictment, and Parke B. there said that the words "to make such other order as justice may require" did not apply, as they referred to letting the prisoner out on bail and the like. In the next case, *Reg.* v. *Mellor* (2), it was discovered after the prisoner had been convicted of murder and sentenced to death that a juryman who was on the panel had by mistake answered to the name of another juryman and had gone into the box and been sworn under that name, and the question was referred by the judge to the Court for the Consideration of Crown Cases Reserved. Two questions arose: 1. Was this a question of law which arose upon the trial? 2. Assuming that it was and that there was a mistrial could the Court award a venire de novo? Upon the first question a majority of the judges were of opinion in the negative and accordingly the conviction was upheld. Upon the second question in the appellant's submission, the judges were six against six, but of course this was not decision but opinion only. Those who thought that the Court had power were Lord Campbell C.J., Cockburn C.J., Coleridge and Wightman L.JJ., and Martin and Watson BB. Those who thought the contrary were Pollock C.B., Erle, Williams, Crompton and Willes JJ., and Channell B. Crowder and Byles JJ. expressed no concluded opinion on this point, but thought that there was no mistrial. The appellant relies upon the reasoning of Pollock C.B., who was of opinion that the Act clearly did not intend to confer upon the Court the jurisdiction of the Court of Error, but contemplated the final determination of the matter and never contemplated any

(1) (1850) 1 Den. C. C. 565. (2) Dears. & B. 468.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR.

new trial or any venire de novo. Justice might require the granting of a new trial as well as the awarding of a venire de novo, but it was conceded that this Court had no power to grant a new trial. All that the Court had power to do was to vacate the conviction. In his opinion the prisoner ought to be left to his writ of error. To construe the words "to make such order as justice requires" otherwise would not be expounding the Act, but would be legislating and assuming an authority which the Legislature never intended to confer upon the Court. The Chief Baron's critical examination of the Act is unanswerable. In the third case under the Act, *Reg.* v. *Yeadon* (1), the Court awarded a venire de novo, but the question of jurisdiction was not argued. In *Reg.* v. *Bertrand* (2), an appeal from the Supreme Court of New South Wales, which had not only the same powers as the Court of Queen's Bench in England under its ordinary jurisdiction, but had also the same powers as the Court for the consideration of Crown Cases Reserved in England, the judicial committee held that the Court had no power to grant a new trial in the case of a felony and declined to follow *Reg.* v. *Scaife* (3), where a new trial was granted, apparently by inadvertence. That decision, which has no immediate bearing on the present case, was followed in *Reg.* v. *Murphy* (4) —also an appeal from the Supreme Court of New South Wales— where one of the grounds of decision was that the jurisdiction to award a venire de novo was that of a technically constituted Court of Error. The last case on the point under this Act of 1848 was *Reg.* v. *Martin* (5), where Bovill C.J. thought that, in view of the decision of the Privy Council in *Reg.* v. *Murphy* (4), the decisions as to the jurisdiction of the Court for the consideration of Crown Cases Reserved to award a venire de novo might require reconsideration.

Taking the cases under the Criminal Appeal Act in order of date, *Rex* v. *Dickman* (6), where it was held that there had been no mistrial, contains an expression of opinion by

(1) L. & C. C. C. 81.
(2) (1867) L. R. 1 P. C. 520.
(3) (1851) 17 Q. B. 238.
(4) (1869) L. R. 2 P. C. 535.
(5) (1872) L. R. 1 C. C. 378.
(6) (1910) 74 J. P. 449.

Lord Alverstone C.J., arguendo, that if there had been a mistrial the Court of Criminal Appeal would have had jurisdiction to award a venire de novo. That dictum was obiter only and the other members of the Court did not concur in it. *Rex* v. *Baker* (1) was a case in which a plea of guilty had been wrongly entered. There was consequently no trial, and therefore no question of venire de novo arose. The Court set aside the conviction and ordered the appellant to appear at the next session of the Central Criminal Court and plead to the indictment. *Rex* v. *Ingleson* (2) and *Rex* v. *Golathan* (3) were to the same effect as *Rex* v. *Baker* (1) and carry the matter no further. *Rex* v. *Wakefield* (4) was a case of personation of a juryman, and in that case the Court quashed the conviction and awarded a venire de novo. There Darling J. treated the majority of the judges in *Reg.* v. *Mellor* (5) as deciding that the Court for the Consideration of Crown Cases Reserved had no statutory power to award a venire de novo, and he bases his judgment on the ground that the Court of Criminal Appeal had a larger jurisdiction than the old Court for the consideration of Crown Cases Reserved. But the cases of *Baker* (1) and *Golathan* (3) which he cites in support of that proposition do not support it.

In the appellant's submission, the general words of this Act cannot be approached by saying that the Legislature must have intended to transfer a jurisdiction so valuable as this jurisdiction was. Any argument in favour of transferring the powers of a Court of Error must be equally applicable to transferring the other jurisdiction abolished by the Act of granting new trials in criminal cases. The two things are grouped together in s. 20 in the same section. Yet it is conceded that the Court of Criminal Appeal has no power to grant new trials, though the Court has often lamented the absence of that power. It is no more illogical to acquit a man, who may be an obviously guilty man, on the ground

(1) (1912) 7 Cr. App. R. 217; 28 Times L. R. 363.
(2) [1915] 1 K. B. 512; 11 Cr. App. R. 21.
(3) (1915) 11 Cr. App. R. 79.
(4) [1918] 1 K. B. 216.
(5) Dears. & B. 468.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR.

that the Court has no power on a mistrial to award a venire de novo than it is to acquit him on the ground that the Court has no power to grant a new trial; yet that is done every day. The reason for the provision in s. 20 may be presumed to be that when once a man has stood his trial on a criminal charge, according to an Englishman's notion of fair play, he ought not to be tried a second time. In fact the grounds for granting a new trial are always grounds that go to the merits, while the ground for awarding a venire de novo is irregularity of the process.

[They also referred to *Reg.* v. *Garland* (1); *Vaux's Case* (2); *Reg.* v. *Duncan* (3); *Conway and Lynch* v. *The Queen* (4); Chitty's Criminal Law, 2nd ed., vol. i., p. 506; *Vicary* v. *Farthing* (5); *Graves* v. *Short* (6); *Rex* v. *Tremearne* (7); *Dovey* v. *Hobson* (8); *Reg.* v. *Brett* (9); *Rex* v. *Fowler* (10); *Rex* v. *Edmonds* (11); Pollock and Maitland's History of English Law, 2nd ed., vol. ii., p. 668; Holdsworth's History of English Law, vol. i., pp. 84–91; Stephen's History of the Criminal Law, vol. i., p. 309; *Wilkes's Case* (12); *Ex parte Newton* (13); Short and Mellor's Practice of the Crown Office, 1st ed., p. 312; *Gray* v. *The Queen* (14); *Bradlaugh* v. *The Queen* (15); *Castro* v. *The Queen* (16); Stephen's Digest of Criminal Procedure (1883 ed.), p. 195; *Alleyne* v. *The Queen.* (17)]

Sir Gordon Hewart A.-G. and *Travers Humphreys* (with them *G. A. H. Branson* (18) and *F. Hinde*) for the respondent. The trial was a nullity, because there was no power in the jury to try together two persons on separate indictments. That is no mere irregularity. It rendered the whole proceedings void ab initio as against both defendants. The substantial

(1) (1869) 11 Cox C. C. 224.
(2) (1590) 4 Rep. 44*a*.
(3) (1881) 7 Q. B. D. 198.
(4) (1845) 7 Ir. L. R. 149, 165.
(5) (1595) Cro. Eliz. 411.
(6) (1598) Cro. Eliz. 616.
(7) (1826) 5 B. & C. 254.
(8) (1816) 6 Taunt. 460.
(9) (1848) 3 Cox C. C. 79.
(10) (1821) 4 B. & Al. 273.
(11) (1821) 4 B. & Al. 471.
(12) (1770) 4 Burr. 2527, 2550.
(13) (1855) 4 E. & B. 869.
(14) (1844) 11 Cl. & F. 427.
(15) (1878) 3 Q. B. D. 607.
(16) (1881) 6 App. Cas. 229.
(17) (1855) 24 L. J. (Q. B.) 282.
(18) Mr. Branson was promoted to the Bench during the trial.

question is, was there power in the Court of Criminal Appeal to order that the indictment shall be tried? This is an order which the Court was entitled to make by the terms of the statute by which it was constituted and quite apart from the powers possessed by other Courts, including the Court for the Consideration of Crown Cases Reserved. It is not in terms an award of a venire de novo though the order has the same effect. It is submitted that the Court has not allowed the appeal, but has said in effect that it has no power to consider the question of this conviction at all, but can only direct that the indictment shall go down to be tried. In cases where there has been a nullity or mistrial, whichever is the correct expression, up to 1907 the appropriate Court—i.e., either the Court for the Consideration of Crown Cases Reserved or a Court of Error—had power to set the matter right by ordering the indictment to be tried by means of a venire de novo. Therefore it must be contended that that power has been deliberately taken away by the Legislature from a Court which it was creating with far larger powers than had ever been possessed by any Court of criminal jurisdiction. The Act of 1907 intended to create a Court which was to take the place of all the Courts which had hitherto exercised criminal appellate jurisdiction and to confer upon it extraordinarily wide powers. Sub-s. 7 of s. 1 is the keynote of the statute. By virtue of that sub-section the Court has the widest possible power to do what is necessary to secure justice, and it is for that reason that the cumbersome machinery of writs of error was abolished. Writs of error were abolished not because it was desired to take away from the Court of Criminal Appeal the power to do what could formerly be done by a writ of error, but because this Court has powers wide enough to effect the same object without the necessity of a writ of error, and the Legislature provides other machinery for that purpose. It is not admitted that the appellant had any real grievance in this matter or that the Court, if the matter was to be regarded as a mere irregularity, ought not to have dismissed the appeal on the ground that no substantial miscarriage of justice had

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR.

occurred. In the ordinary course there would have been a joint indictment against these prisoners, who would then have been tried together, subject to the power of the judge to order a separate trial if the interests of justice so required. In the respondent's submission the order under appeal is a good order by virtue of s. 1, sub-s. 7. That is the only enactment under which the order could have been made, inasmuch as s. 4 does not apply. Sect. 3 gives a right of appeal to a person convicted on indictment either as of right on a question of law or by leave of the Court on a question of fact. Although there was here no real conviction there was in form a conviction, which is a sufficient foundation for the right of appeal. Sect. 4 provides for the determination of appeals in ordinary cases, to use the expression in the marginal note. Sub-s. 1 of that section circumscribes the power of the Court to allow an appeal and limits it to four grounds, none of which applies to this case, consequently if the Court had to make an order under that sub-section it must have been an order dismissing the appeal. Therefore recourse must be had to the general words of sub-s. 7 of s. 1. It is that sub-section which enables the Court to determine the question whether there has been any trial at all—a question which under s. 4 the Court does not appear to have any power to consider. Sect. 20, sub-s. 1, deprives any Court which otherwise would have had co-ordinate jurisdiction with the Court of Criminal Appeal of its powers, and those powers are impliedly transferred to the new Court by s. 1, sub-s. 7. By sub-s. 4 of s. 20 the jurisdiction formerly exercised by the Court for the Consideration of Crown Cases Reserved is expressly transferred to the new Court. If then the Court for the Consideration of Crown Cases Reserved had power to issue a writ of venire de novo, it is conceded that that jurisdiction is now vested in the Court of Criminal Appeal, but the respondent's case does not depend wholly on that. The foundation of his case is that the trial was a nullity and that that was the view upon which the Court of Criminal Appeal proceeded. It was thought that there was a joint indictment, and, there being no such indictment, the appellant was not convicted

on any existing indictment. As the trial was a nullity, the Court simply directs that the proceedings shall be taken up at the point where they went wrong. Here there was no need to issue a writ of venire de novo. It was enough to say "This indictment has never been tried; let justice be done," and then when the indictment went back to Quarter Sessions it would be the duty of the Clerk of the Peace to see that it was tried. It was merely to avoid the possibility of mistake that the Court went on to direct the trial of the indictment. *Wakefield's Case* (1) is like this in that what had been done wrong—it was a case in which the tribunal was not properly constituted—did not come within s. 4 at all, and but for s. 1, sub-s. 7, the Court would have been unable to cure what was a gross irregularity. If that decision is wrong it is difficult to see under what section the Court would have had any power to make any order at all.

In *Mellor's Case* (2) eight of the fourteen judges held that the conviction must stand, either because there had been no mistrial or because there was no question of law arising on the trial; but all those who held that there was a mistrial held that the Court had power to award a venire de novo. Of those six, however, Coleridge J. and Martin B. thought it was not necessary to put the order in that form, and that it was sufficient to say that the conviction should be quashed and the indictment tried. That is the form adopted by the Court of Criminal Appeal in *Baker's Case* (3) and the other cases which have followed it, and it was probably based upon the opinion of those two learned judges. The view of the judges who thought that they had no power to make the order was based on the view that the procedure by a writ of error was still open to the accused and that in the particular circumstances of that case it was not a satisfactory case in which to make the order. On any view of the case there was no decision on the point. Then in *Yeadon's Case* (4) the Court, which included two of the judges who thought that a venire de novo ought not to issue in *Mellor's*

(1) [1918] 1 K. B. 216.
(2) Dears. & B. 468.
(3) 7 Cr. App. R. 217.
(4) L. & C. C. C. 81.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR.

Case (1)—namely, Pollock C.B. and Channell B.—unanimously awarded a venire de novo. Therefore the draftsman of the Criminal Appeal Act, 1907, would think, and would rightly think, that the Court for the Consideration of Crown Cases Reserved had power to grant the writ. The order under appeal, though not in form a venire de novo, may be supported on two grounds: (1.) under sub-s. 4 of s. 20, and (2.) under sub-s. 7 of s. 1. Sect. 4 does not apply, because it was founded on the assumption that what was being there dealt with was a real trial. Assuming that that section applies, sub-s. 7 of s. 1 and sub-s. 4 of s. 20 are "special provisions" within sub-s. 2 of s. 4. The appeal should therefore be dismissed.

J. B. Matthews K.C. in reply. It is said that the Court of Criminal Appeal has not allowed the appeal, but the Lord Chief Justice says in terms "The Court allows the appeal." Then, if the appeal is allowed, the statute is express as to what is to happen: s. 4, sub-s. 2. The Court must quash the conviction and direct a judgment and verdict of acquittal to be entered. The meaning of Parliament was that no man should be put twice upon his trial for a criminal offence. On no other principle can the abolition of the jurisdiction to grant a new trial in misdemeanours be accounted for. In this case it is plain that no question of law ever arose at the trial. If this case had arisen in the old days before the Court for the Consideration of Crown Cases Reserved the questions would be: First, Was a question reserved by the judge at the trial? Secondly, Was it a question arising on the trial? Both those questions must have been answered in the negative. Therefore the Court of Criminal Appeal gets nothing from the transfer of the jurisdiction of the Court for the Consideration of Crown Cases Reserved. Sect. 1, sub-s. 7, does not assist the respondent; it merely gives incidental jurisdiction to the Court of Criminal Appeal to decide any matters which require to be decided for the purpose of allowing or dismissing an appeal.

The House took time for consideration.

(1) Dears. & B. 468.

1921. June 6. VISCOUNT FINLAY. My Lords, an indictment was preferred against Crane at the Leicester City Sessions for receiving skins knowing them to have been stolen. Morton was charged on a separate indictment containing two counts, the one for stealing the other for receiving the skins. Crane and Morton were given in charge to the same jury and were tried together. Crane was found guilty, also Morton. Notice of appeal was given on behalf of Crane on the ground that the verdict was against the weight of evidence and of misdirection, also that the summing up was unfair and the sentence excessive. On the hearing of the appeal it was pointed out from the Bench that there was no joint indictment, and it was suggested that the trial might be a nullity. Lord Reading C.J., in giving judgment, after stating the course of proceedings, said: (1) "At the trial, as we now know, both Morton and Crane were given in charge to the same jury, as if they had been jointly indicted under one indictment, whereas in truth there were separate indictments. The result is that there never has been a trial at all. It is sufficient for this Court to say that the proceedings were *void ab initio*. It has been argued that the proceedings were only irregular and that where there was an irregularity in procedure, the Court could not treat the trial as a nullity. But that argument cannot be accepted. The Court must view the proceedings as if there had been no trial at all."

The Lord Chief Justice proceeded, after citing the cases of *Baker* (2), *Ingleson* (3), *Golathan* (4) and *Wakefield* (5), to say: (1) "These cases are, in our opinion, authority for the course which this Court proposes to take in this case, that is, to treat the verdict and sentence as a nullity. Following the course taken in *Baker*, the verdict and sentence are expunged from the record. That being so, there is the indictment against the appellant on which no trial has taken place. He must stand his trial on that indictment."

(1) This passage is quoted from the Appendix.
(2) 7 Cr. App. R. 217.
(3) [1915] 1 K. B. 512.
(4) [1915] W. N. 45; 11 Cr. App. R. 79; 31 Times L. R. 177.
(5) [1918] 1 K. B. 216.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Viscount Finlay.

The order of the Court was: "Upon consideration being this day had by the Court of Criminal Appeal, as duly constituted for the hearing of Appeals under the Act, of the Appeal of the above-named Appellant against conviction, the Court doth finally determine the same and doth order that the conviction and judgment on the indictment whereon the Appellant was convicted be set aside and annulled and that the Appellant do appear at the next Quarter Sessions to be holden in and for the City of Leicester there to take his trial according to law upon the said indictment and that in the meantime the Appellant be admitted to bail upon his own Recognizance in the sum of 80*l.* and upon the Recognizance of two sufficient sureties in the sum of 40*l.* each."

Crane appealed against the words in the order: "That the Appellant do appear at the next Quarter Sessions to be holden in and for the City of Leicester there to take his trial according to law upon the said indictment." In other words, he asked that judgment of acquittal should be entered. The Attorney-General gave his certificate on the ground that the appeal involved a point of law of exceptional public importance, and that it was desirable in the public interests that a further appeal should be brought.

It was contended on behalf of the defendant at your Lordships' Bar that the Court of Criminal Appeal must, if they allow an appeal against a conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered. The question turns upon the terms of the Act setting up the Court of Criminal Appeal, the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23). Sect. 1 of that Act provides for the constitution of a Court of Criminal Appeal, and by sub-s. 7 enacts: "The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court."

Sect. 3 gives the power of appeal on certain grounds.

"3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

"(*a*) against his conviction on any ground of appeal which involves a question of law alone; and

"(*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

"(*c*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

It is necessary also to refer to the first and second sub-sections of s. 4:—

"4.—(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

"Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

"(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

Sect. 5 is as follows:—

"5.—(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Viscount Finlay.

on some other count or part of the indictment, the court may either affirm the sentence passed on the Appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

"(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

"(3) Where on the conviction of the appellant the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the Appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

"(4) If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act."

The only other provisions to which it is necessary to refer are the first and fourth sub-sections of s. 20 :—

"20.—(1) Writs of error, and the powers and practice

now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished.

"(4) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by section forty-seven of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved."

The clause mainly relied upon by the appellant was s. 4, sub-s. 2, which provides that, subject to the special provisions of the Act, the Court shall, if they allow an appeal, direct judgment and verdict of acquittal. It was argued that there is no special provision in the Act which authorizes the direction in the order that the appellant should appear at the next quarter sessions to take his trial upon the indictment.

It appears to be clear upon the terms of the Act, s. 4, sub-s. 2, that if an appeal is allowed, an acquittal must be entered unless there is something to the contrary to be found in the special provisions referred to in the sub-section.

The Crown relied greatly upon the seventh sub-section of s. 1 as giving a general power to make orders according to the circumstances of the particular case. I am unable to read the sub-section in this way. There are no words in it which authorize the making of any Order. All that it does is to give "full power to determine in accordance with this Act any questions necessary to be determined for the purpose of doing justice in the case before the Court." There is no general power here to make any Order which the Court thinks justice requires. The power, and the only power, conferred is to determine any question necessary to be

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Viscount Finlay.

determined for the purpose of doing justice in the case. It appears to me that it would be contrary to all principles of construction to construe these words as giving power to make any Order other than those authorized by the Act. What it does is to authorize the Court "to determine in accordance with this Act" any question necessary to enable it to see that the Order made does justice, and this power is conferred "subject to the provisions of this Act." Justice might require a new trial, but there is no power to order it.

A good deal of argument was devoted to s. 4, sub-s. 1. That sub-section provides that the appeal shall be allowed in four cases :—

(i.) If the Court thinks that the verdict should be set aside on the ground that it is unreasonable.

(ii.) If they think that it cannot be supported having regard to the evidence.

(iii.) If they think that the judgment should be set aside on the ground of a wrong decision on any point of law.

(iv.) If they think that on any ground there was a miscarriage of justice,

and goes on to provide that the Court "in any other case shall dismiss the appeal." There is a proviso that the Court may dismiss the appeal if they consider that no miscarriage of justice has actually occurred. It was contended for the respondent that this sub-section applies only to cases therein specified, and that the present case is not one of them. But, in fact, this sub-section covers the whole ground and applies to the present case. The Court is to allow the appeal (subject to the proviso) if any one of the four grounds enumerated is made good, "and in any other case shall dismiss the appeal." This sub-section deals with every possible case of appeal. Every appeal either does or does not fall within the four enumerated grounds; in the first case it is to be allowed, always subject to the proviso; in the second case it is to be dismissed. Then follows sub-s. 2, with its enactment that, subject to any special provisions of the Act, the Court shall, if they allow an appeal, quash the conviction and direct a judgment and verdict of acquittal.

If the appeal is dismissed there is, of course, an end of the matter, and sub-s. 2 is clear that if the Court allows an appeal there is to be an acquittal subject to the special provisions of the Act.

Sect. 5 makes what appear to me to be "the special provisions" referred to in s. 4, sub-s. 2. Sub-s. 1 provides for a case in which the appellant, though not properly convicted on part of the indictment, has been properly convicted on some other part, and gives power either to affirm the sentence passed or to pass an appropriate sentence. Sub-s. 2 deals with any case in which the appellant has been convicted of an offence, and the jury could, on the indictment, have found him guilty of some other offence, and provides that if it appears to the Court that the jury must have been satisfied of the facts which proved him guilty of that other offence, the Court may substitute a verdict of "guilty" of that other offence. Sub-s. 3 provides for the case of a special verdict on which a wrong conclusion has been arrived at by the Court below, and gives power to the Court of Criminal Appeal to draw the right conclusion. Sub-s. 4 provides for the case of insanity. Each of these provisions (correctly described in the marginal note as "powers of court in special cases") is a qualification of the general enactment in s. 4, sub-s. 2. They exactly answer the description of "the special provisions" and the section containing them immediately follows s. 4. It appears to me that there are no other parts of the Act which can be made to fit the description in s. 4, sub-s. 2, of "the special provisions." I have already referred to s. 1, sub-s. 7, the first case suggested by the respondent as a "special provision" within s. 4, sub-s. 2. I have given my reasons for my view that it does not bear the meaning which the respondent seeks to put upon it. But in any case it does not answer the description of a "special provision."

The second case suggested by the respondent as a "special provision" under s. 4, sub-s. 2, arises under s. 20. Sect. 20 begins by abolishing writs of error. But for this provision the miscarriage in the present case could have been at once corrected. It would appear on the face of the record that

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Viscount Finlay.

although there were only separate indictments the two men had been tried together. The verdict would have been quashed and a venire de novo awarded. The section goes on to abolish the powers and practice now existing in the High Court as to new trials in criminal cases, so that we must now look only to the provisions of the present Act if there is anything that requires to be set right. The second part of the Act on which the Crown relied as one of "the special provisions" under s. 4, sub-s. 2, is the fourth sub-section of s. 20. That sub-section vests in the Criminal Appeal Court all jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law on criminal trials, and provides that if there is an appeal which involves a question of law alone the Court may decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require the case to be stated in the same manner as if a question of law had been reserved. I respectfully think that it would be a mistake to regard this as one of the "special provisions" within the meaning of s. 4, sub-s. 2. It is a provision of a general nature as to procedure under the Crown Cases Act, 1848. The ingenious argument by which the respondent's counsel tried to show that this clause amounted to a special provision, as I understand it, was this. The Court for Crown Cases Reserved had, it was said, power to award a venire de novo, and this power was transferred to the Court of Criminal Appeal under the general words of s. 20, sub-s. 4. It is far from clear that the Court for Crown Cases Reserved had this power—indeed there is only one case, so we are informed, in which such a power was exercised by that Court and that case was in 1861. But assuming that the Court for Crown Cases Reserved had that power, would this clause transfer it to the Court of Criminal Appeal? I think not. To get rid of the effect of the precise enactment of s. 4, sub-s. 2, you must find something in "the special provisions" to the contrary. The transfer of the jurisdiction under the Crown Cases Act is not such a special provision. The enactment in sub-s. 4 of s. 20 cannot override the express provisions of s. 4, sub-s. 2, unless there were

something to show that it was intended so to operate. It is indeed alien to the scope of s. 20, sub-s. 4, to regard it as anything but a general enactment transferring to the Court of Criminal Appeal the powers of the Court for Crown Cases Reserved. Assuming this latter Court had the power to issue a venire de novo, can such a general transfer be regarded as overriding the express enactment that if an appeal is allowed the Court of Appeal shall direct a verdict of acquittal ? If anything of the kind had been intended there would have been a special provision to that effect. You cannot rely for such a purpose upon a general enactment under which, amid all the powers of the Court for Crown cases, lurks the power to order a venire de novo. In truth "the special provisions" are the group of provisions in the next section, s. 5. But indeed the Court of Criminal Appeal have not ordered a venire de novo. Their order proceeds on the basis that the trial was a nullity and that the proceedings should simply be resumed at the point where the mistake was made.

It was urged before your Lordships, as it had been urged in the Court of Criminal Appeal, that the whole proceedings at the Leicester City Sessions were a nullity, that there had been in truth no trial at all, and that Crane should go to Leicester to be tried on the indictment. It is suggested that the proceedings should simply be taken up at the point at which they stopped; that he was wrongly given into the charge of the jury jointly with Morton; that all the subsequent proceedings at the City of Leicester Autumn Sessions may be regarded as non-existent, and that the trial should now take place. I cannot accept this view of the case. The trial of Crane was not a nullity. But for the fact that it has been quashed by the Court of Criminal Appeal, these proceedings would have been for Crane a very grim reality. The idea appears to be that Crane was tried upon a non-existent indictment in which it was supposed that he and Morton were jointly charged. I do not think that this is a correct view of the situation. Crane was tried upon the indictment against him separately, the only indictment that existed. It is true that a very grave irregularity occurred.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Viscount Finlay.

Along with him Morton was tried, and this irregularity supplied ample grounds for quashing the conviction which ensued. But to treat the proceedings which followed the giving of the persons in charge as a nullity appears to me to be playing with words. They were so irregular that they have had to be set aside, and the result is that in the terms of the Act there must be judgment of acquittal. The sentence upon Crane would have been a good return to a writ of habeas corpus. Proceedings which are a nullity could afford no justification for imprisonment. If the trial was a nullity, the Recorder might forthwith have proceeded to try Crane again without any order from the Court of Criminal Appeal. The same result would have followed if the jury had found Crane "not guilty"—if the proceedings were a nullity, there was no trial and no verdict. The theory of nullity does not in my opinion bear examination. It is not the fact that Crane was tried upon a non-existent indictment. Persons with knowledge of criminal practice may have supposed that there must have been a joint indictment. But, in fact, there was none, and he was tried on the separate indictment. I do not think that there was any slip in the drafting of the Act. It appears to me that it was the deliberate policy of the Legislature in this Act to prevent any further proceedings such as would have taken place on an award of a venire de novo by the Court of Error or the granting of a new trial by the High Court in criminal cases. If the appeal was allowed, the defendant was to be acquitted, and there was to be nothing which could be represented as putting a man in peril a second time on a criminal trial. Whatever view may be taken of the policy embodied in the Act, any alteration must be a matter for the Legislature. In the present case it appears that the Act may lead to a grave miscarriage of justice by putting an end to proceedings which have miscarried under a mere blunder at quarter sessions. But it does not fall within the province of any Court of law to try to correct an occasional injustice arising from a statute by putting a strained construction upon its provisions.

In my opinion the appeal should be allowed.

LORD ATKINSON. My Lords, in this case the two persons accused were tried together as if they had been jointly indicted, as they might have been under 6 & 7 Geo. 5, c. 50, s. 40, which has replaced 24 & 25 Vict. c. 96, s. 93. They were not jointly indicted. On the contrary, an indictment was found against one of them charging him in one count with stealing goods, and in a second count with receiving those goods knowing them to have been stolen, and another and independent indictment was found against the accused, William Crane, charging him with the offence of receiving goods knowing them to have been stolen. When an accused person has pleaded "Not guilty" to the offences charged against him in an indictment, and another accused person has pleaded "Not guilty" to the offence or offences charged against him in another separate and independent indictment it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together. It is obvious that many inconveniences would arise in practice if they were tried together; one amongst them would be this, that in a case where a felony was charged against each, the one might by his peremptory challenges put off from the jury the very men by whom the other desired to be tried, whereas had they been indicted jointly and did not join in their challenges they might have been, and probably would have been, tried in succession, and only those jurors which the person on trial objected to would have been peremptorily challenged. But that consideration is, in my view, quite beside the point. The appellant, William Crane, was never, as far as I can discover, properly arraigned on the indictment found against him. He never pleaded to that indictment, the jury who found him guilty were never sworn to try him separately, and had no jurisdiction to find against him the verdict they have found. The whole proceedings were, in my view, as against him, a mis-trial and a nullity. When the conviction and judgment against him, William Crane, had been set aside and annulled as they, most properly, have been by the Court of Criminal Appeal, the indictment found

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Atkinson.

against him stands, in my view, as if he never had been tried at all. It is, I think, plain that if under the old practice this mis-trial had been brought before the Court of Queen's Bench on a writ of error, the error in the proceedings being set out in full on the record as it must have been, the verdict and judgment would have been set aside and annulled, and a venire facias juratores de novo would have been awarded.

In *Rex* v. *Edmonds* (1), the accused, who was indicted for a misdemeanour, took two challenges, one to the array of the jurors and the other to the polls, but took them before a full jury had appeared, a fatal defect. These challenges were disallowed. Abbott C.J., in delivering judgment, said: "It must further be observed, that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a venire de novo. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting, or the improper refusing of a challenge, is alike the foundation for a writ of error. Every challenge, either to the array or to the polls ought to be propounded in such a way, that it may be put at the time upon the nisi prius record." The distinction between a venire de novo properly so called and a new trial is here clearly taken.

In *Rex* v. *Fowler* (2), the two accused were, at quarter sessions for the county of Sussex, indicted for the felony of stealing. They pleaded "Not guilty," and put themselves upon their country. Upon that indictment they were found guilty. The record stated that after the evidence had been given, and after the jury had retired to consider their verdict, one of the jurors, before the delivery of the verdict, had, without the permission of the justices, separated himself from his fellows and held a conversation with a person, not a member of the jury, concerning the trial and the verdict about to be given. The justices thereupon quashed the verdict given as bad and erroneous, and ordered that a new jury should come before the justices at the next general quarter sessions of

(1) 4 B. & Al. 471, 473. (2) 4 B. & Al. 273.

the peace for the county of Sussex to be held at Chichester, to try whether the defendants or either of them were guilty of the premises charged in the indictment against them. The accused were tried at the quarter sessions at Chichester and convicted. A writ of error was applied for in the Court of King's Bench on the ground that the justices so assembled had no jurisdiction to try the accused on the indictment so found. The Court, in giving judgment, said (1): "The first verdict was either good or bad. If it were good, then the second trial was coram non judice, and may be considered as a nullity. If, on the other hand, the first verdict were bad, inasmuch as the prisoners had put themselves upon the country, the prisoners might well be tried at the next sessions, and the second trial is not to be considered in the nature of a new trial, but the first trial is to be considered a mis-trial, and therefore a nullity." See also *Campbell* v. *The Queen* (2), a decision which, in *Charlotte Winsor's Case* (3), was criticised and approved of by Blackburn J.

The fact that the trial of Crane was rightly held to be a mis-trial and a nullity does not disentitle him, under s. 3 of the Criminal Appeal Act, 1907, to appeal against it. He is still a person convicted on an indictment within the meaning of that section, since those words cannot mean validly convicted, otherwise the statute would be futile and unworkable. The provisions of s. 4 clearly show that convictions which the Court of Criminal Appeal decide to be bad may be and are properly brought before them by the person convicted. The very purpose for which the Court was created was to consider whether the convictions of persons who had, in fact, been convicted were valid or the contrary, and to deal with them accordingly.

The Act of 1907, by its twentieth section, abolishes not only writs of error, but in addition the powers and practice of the High Court, as they then existed, in respect of motions for new trials or the granting thereof in criminal cases. As by s. 1, sub-s. 7, of this statute jurisdiction is conferred upon

(1) 4 B. & Al. 275.
(2) (1846) 11 Q. B. 799.
(3) (1866) L. R. 1 Q. B. 289, 319; 35 L. J. (M. C.) 121, 133.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Atkinson.

the Court by it created to determine, subject to and in accordance with its provisions, any questions necessary to be determined for the purpose of doing justice in a case before it, one would naturally expect to find that the statute would provide some adequate substitute for the machinery, so protective of the rights of the subject, which by s. 20 it so completely sweeps away. This feature of this statute is in marked contrast with the provisions of s. 5 of the 11 & 12 Vict. c. 78, which created the Court of Crown Cases Reserved. That section, so far from abolishing writs of error, increased the powers and improved the procedure of Courts of Error dealing with criminal cases. In the important case of *Reg.* v. *Mellor* (1), to be presently referred to, much importance was attached to what was in this respect affected by this s. 5; and it would appear to me that in the construction of the Act of 1907 one is similarly entitled to attach much importance to the sweeping provision of its twentieth section. If some adequate substitute be not expressly or impliedly provided for the valuable machinery which is thus taken away, one would be forced to the conclusion that a mischievous and unaccountable blunder, most hurtful to the subject and embarrassing in the administration of justice, had been committed in the drafting of the Act. By sub-s. 4 of this same s. 20 all the jurisdiction and authority under the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), in relation to questions of law arising in criminal trials which are transferred to judges of the High Court by s. 47 of the Supreme Court of Judicature Act, 1873, are vested in the Court of Criminal Appeal. It is necessary to consider what is the nature and extent of the jurisdiction and authority thus transferred and vested. The Act of 1848, by its first section, provided, that where any person shall have been convicted of any treason, felony, or misdemeanour before any Court of Oyer and Terminer or Gaol Delivery, or Quarter Sessions, the Judge, Commissioner, or Justices of the Peace, before whom the case shall have been tried, may, in his or their discretion reserve any question of law which shall have arisen on the trial for the consideration

(1) Dears. & B. 468.

of the Justices of either Bench and Barons of the Exchequer. The Judge, Commissioner or Court of Quarter Sessions so reserving this question of law, is to state in a case in the manner usual the question of law so reserved, with the circumstances under which same shall have arisen, and this case is to be transmitted to the Justices and Barons (s. 2). The Court of Criminal Appeal may, to an appropriate extent, adopt and follow this procedure where a person convicted appeals against a conviction on any ground of appeal involving a question of law alone (s. 20, sub-s. 4). It is most important to consider what by this same s. 2 of the Act of 1848 the Justices and Barons are empowered to do when the case comes before them.

They are empowered finally to hear and determine the question or questions so reserved, and thereupon to "reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Justices and Barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other Session of Oyer and Terminer or Gaol Delivery, or other Sessions of the Peace, if no judgment shall have been before that time given, as they shall be advised, *or to make such other order as justice may require.*"

The important question for the purposes of the present case to determine is whether these last ten words empowered the Justices and Barons, in addition to holding that the trial in which the question referred to them was a mis-trial, to award a venire de novo. If they had that power it has passed to the Court of Criminal Appeal under s. 20, sub-s. 4, of the Act of 1907, even if they had not got the same power, which is by no means admitted, under some of the other provisions of this Act of 1907. This question has given rise to a most marked division of judicial opinion, in the case of *Reg.* v. *Mellor* (1) already mentioned. In that case Aaron Mellor was

(1) Dears. & B. 468.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Atkinson.

tried at the Liverpool Assizes for murder; was convicted and sentenced to death. The jury panel contained the names of two men, one named I. T. and the other named W. T. The name of I. T. was called when W. T. by mistake answered and was, without objection, sworn. The mistake that had been made was discovered next day, and a question was reserved by Wightman J., who had tried the case, for the opinion of the Court for Crown Cases Reserved as to the effect of what had happened.

Fourteen judges, including Lord Campbell C.J., Cockburn C.J., and Pollock C.B., composed the Court which heard and decided the question of law referred. Eight, including the Chief Baron, held that the mistake was only a ground of challenge and did not make the trial which had been held a mis-trial, and apparently held also, but this is not quite so clear, that even if it had made the trial a mis-trial a venire de novo could not have been awarded, and that the verdict and judgment should not be disturbed. Six judges, including Lord Campbell C.J. and Cockburn C.J., held that this was a mis-trial, and that a venire de novo could properly be awarded. The ground the minority chiefly relied upon to show that the trial was a mis-trial was that the mistake interfered with the prisoner's right of challenge, inasmuch as he might well have had no objection to the juror whose name was called, but every objection to the juror who was sworn had he known who that juror really was. The six learned judges who composed the minority were Lord Campbell C.J., Cockburn C.J., Coleridge and Wightman JJ., and Martin and Watson BB. The majority was composed of Pollock C.B., Erle, Williams, Crompton, Willes, Byles and Crowder JJ., and Channell B. Lord Campbell C.J. delivered an exhaustive judgment, reviewing all the authorities, and held that the language of the statute should be liberally construed; that the trial was a mis-trial, and that the words "or make such other order as justice may require" justified the award of a venire de novo when there was a mis-trial. The remaining five judges, forming the minority, apparently agreed with him, but while the judges of the majority

apparently held that there had been no mis-trial, they did not agree as to the grounds upon which they respectively based their opinions that even had there been a mis-trial a venire de novo could not have been awarded. For instance, Pollock C.B. relied much on the existence of the power expressly preserved to an accused person by the Act of 1848 to proceed by writ of error. Williams J. held that the question referred was not a question of law arising at the trial, within the meaning of the statute, since the mistake was only discovered after the trial had concluded, and that therefore the Court had no jurisdiction to deal with it. Crompton J. relied upon the fact that there was no record of fact found by the judge before them, but seemed to think that there was no power in the Court to grant a venire de novo. Crowder J. thought there was no mis-trial, but doubted whether the case fell within the statute. Willes J. agreed with the Chief Baron, and Channell B. based his opinion that there could be no venire de novo on this ground, that the statute required that the Court should "hear and finally determine the question referred." There was not, of course, any means of reviewing the decision of the Court for Crown Cases Reserved touching the construction they put upon the Act which called that court into existence, or as to the nature and limits of its powers and authority. It is extremely difficult to say whether the result of all the conflicting opinions delivered in this case was not this, that in a case where there has, as in the present case, been a real and undoubted mis-trial, the Court has power to award a venire de novo. The learned judges composing the majority do not, it would appear to me, seem to have ever faced the difficulty which would arise in a case like the present, where the trial in which the verdict found was such a mis-trial that the conviction could not by any possibility be lawfully affirmed, and yet justice imperatively required that the accused should be tried on the indictment found against him. In the doubt and difficulty which the decision in *Reg.* v. *Mellor* (1) leaves one, the decision in the case of *Reg.* v. *Yeadon* (2) becomes most important and helpful. The Court

(1) Dears. & B. 468.

(2) L. & C. C. C. 81.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Atkinson.

there was composed of Pollock C.B., Wightman and Williams JJ., Martin and Channell BB. Of these Pollock C.B., Williams J., and Channell B. had formed three of the majority of eight which decided the case of *Reg.* v. *Mellor.* (1)

In *Reg.* v. *Yeadon* (2) the accused was tried at the quarter sessions for the West Riding of Yorkshire at Bradford under the 14 & 15 Vict. c. 100, s. 29, and 14 & 15 Vict. c. 19, s. 4, on an indictment containing three counts. The first charged him with inflicting grievous bodily harm on a person named, the second with unlawfully and maliciously cutting and wounding this person, the third with assaulting and occasioning to him actual bodily harm. The indictment did not contain any count for a common assault. The jury found the accused guilty of a common assault. The chairman at quarter sessions refused to receive this verdict, owing to the absence of the count for common assault, and told the jury they should reconsider the verdict. The jury then returned a verdict of guilty, and the verdict entered up was "guilty of occasioning actual bodily harm." The accused was accordingly sentenced. The opinion of the Court of Crown Cases Reserved was asked on the question whether the verdict of guilty of a common assault should have been taken, and whether it was tantamount to an acquittal, or whether the verdict should stand, and the accused should undergo his sentence. The Court unanimously decided that the verdict of "guilty of a common assault" should have been accepted; that the second verdict ought not to have been taken; that the accused should not have to undergo the sentence; that there had been a mis-trial, and awarded a venire de novo to quarter sessions. I cannot find in any of the reports of this case that there was a single suggestion made that the Court were precluded from thus awarding a venire de novo by the decision in *Reg.* v. *Mellor.* (1) This is, I think, a positive decision by a Court of great authority that the Court of Crown Cases Reserved has jurisdiction where there has been a real mis-trial to award a venire de novo. In the

(1) Dears. & B. 468. (2) L. & C. C. C. 81.

present case what is ordered is not a venire de novo in so many words but a new trial, but where there has been a mis-trial, and relief is demanded as a matter of strict legal right on a point of law, no appeal being made to the discretion of the Court, there is little if any difference between the two. Where in the case of a trial for felony an irregularity occurs which is not sufficient to constitute a ground for treating the verdict as a mis-trial and a nullity, it may be that a new trial cannot be granted: *Reg.* v. *Murphy.* (1)

In *Rex* v. *Dickman* (2) Lord Alverstone expressed an apparently confident opinion, after *Reg.* v. *Mellor* (3), *Rex* v. *Edmonds* (4) and *Rex* v. *Fowler* (5) had been cited to him, that if the defect in the trial complained of was such as to make the trial a mis-trial, the Court of Criminal Appeal would have jurisdiction to annul the verdict and judgment and to award a venire facias de novo. The decision in *Reg.* v. *Martin* (6) does not appear to me to be to any extent irreconcilable with the decision in *Reg.* v. *Yeadon.* (7) In *Reg.* v. *Martin* (6) a jury was permitted to view the locus in quo where the crime was alleged to have been committed. Some of the witnesses accompanying some members of the jury were alleged to have conversed with those members. But this allegation was not inquired into or ascertained by the judge to be true. It was decided that the Court could not act on this story which was mere hearsay, and the conviction was accordingly affirmed. The jurisdiction and authority enjoyed by the Court of Crown Cases Reserved has, in my opinion, been transferred by the Act of 1873 to the Supreme Court of Judicature, and by the twentieth section of the Act of 1907 is now vested in the Court of Criminal Appeal.

In my view the Court of Crown Cases Reserved had jurisdiction and authority where a mis-trial occurred to annul and set aside the verdict found and the judgment entered up upon it, and as a necessary result demanded in the interest of

(1) L. R. 2 P. C. 535, 552.
(2) 74 J. P. 449.
(3) Dears. & B. 468.
(4) 4 B. & Al. 471.
(5) 4 B. & Al. 273.
(6) L. R. 1 C. C. 378; 12 Cox C. C. 204.
(7) L. & C. C. C. 81.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Atkinson.

justice, to direct that the accused be tried on the indictment found against him. If that be so, there is nothing, I think, in the Act of 1907 to take away or diminish in any way that jurisdiction or authority as now vested in the Court of Criminal Appeal. This results from the special provision of the Act contained in s. 20, sub-s. 4, to which s. 4, sub-s. 2, is subject. If this were not so this absurd result would follow —that in the case of a mis-trial, which is actually no trial at all, the Court of Criminal Appeal would be obliged when they annulled the conviction in such a case as this to direct an acquittal of the accused, though they at the same time decided that he never had been tried at all. It is unnecessary in this case to decide whether the provisions of s. 1, sub-s. 7, empower the Court of Criminal Appeal to grant a new trial in a case in which there has not been a mis-trial.

I think the appeal fails.

My Lords, I am requested by my noble and learned friend Lord Dunedin to mention that he concurs in the judgment I have just read.

LORD SUMNER. My Lords, the statement of counsel, who defended the appellant at the trial and appeared for him in the Court below, shows that in the belief of all concerned the appellant was tried at Leicester on an indictment which charged him, jointly with David Morton, with the offence for which a conviction was recorded against him. In fact there was no such indictment. The judgment of the Lord Chief Justice shows that the same view of what had occurred was accepted in the Court of Criminal Appeal. So tried, Crane was invalidly tried, and the conviction was without authority. I see no ground for thinking that in reality there was a valid trial—namely, the trial of the appellant on the separate indictment, which had been framed against himself, while at the same time another person, Morton, also separately indicted, was being tried in reality separately though to all appearances jointly with Crane, both simultaneously undergoing the same procedure before the same jury and sharing in the evidence, the speeches, and the

summing up. How the mistake came about does not now matter, but it is clear that the appellant purported to have been tried and convicted on an indictment which did not exist. It was a mis-trial, and in truth no trial at all.

All the same convicted Crane was and to all appearance convicted on an indictment. I think he was so far "a person convicted on indictment" within s. 3 of the Criminal Appeal Act, 1907, as to be competent to appeal against this conviction to the Court of Criminal Appeal. Were it otherwise Crane, who has never had a legal trial at all though imprisoned under sentence on the strength of it, would have to serve his time and apparently be without remedy.

If so, it must surely follow that his appeal is within the words "any such appeal" in s. 4, and as there was a miscarriage of justice (for such it is to deprive an accused person of the protection given by essential steps in criminal procedure) the Court was bound to allow his appeal, in the sense of quashing a de facto conviction, which was in law a nullity. Therefore, by s. 4, sub-s. 2, it became the duty of the Court, having quashed the conviction, to order a verdict of acquittal, but this duty was subject to the special provisions of this Act.

What are they? To the view that s. 1, sub-s. 7, and s. 20, sub-s. 4, are not included among them but that they consist solely of the provisions of s. 5 I have found myself unable to agree. What is subject to the special provisions of the Act is the direction which s. 4, sub-s. 2, gives to the Court, if it allows an appeal against conviction. Sect. 5 provides powers, which the Court may exercise in special cases, if it does not allow an appeal against conviction, but does not think fit to dismiss the appeal—namely, to substitute another sentence or another verdict for that actually passed or found, to record a different conclusion from that drawn at the trial from a special verdict, and in cases of insanity to substitute detention in an asylum for criminal lunatics for the sentence of imprisonment passed at the trial. These are not exceptions from or limitations upon the direction to enter a verdict of

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Sumner.

acquittal, where an appeal against conviction is allowed, and accordingly the provisions of s. 5 do not satisfy the initial words of s. 4, sub-s. 2. These "special provisions" are to be sought elsewhere and are, or at least include, s. 1, sub-s. 7, and s. 20, sub-s. 4. By s. 1, sub-s. 7, the Court has "full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court," and after quashing the conviction described the Court had next to determine the question, how a man who had not been legally tried should now be dealt with. To enter a verdict of acquittal would only be "doing justice" if the jury, under circumstances which made it their duty to render some verdict, had rendered a verdict of guilty, which ought to have been one of not guilty. If the fact be, as it is here, that the appellant should not have been given in charge to the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset, it would not be doing justice to enter a verdict of acquittal in favour of a man who was not entitled to be acquitted under the circumstances. Acquittal implies that a true legal trial has been had. Here there has legally been none at all, but only the semblance of one, a mis-trial, which does not count.

The question then arises what is to be done with the appellant for the purpose of doing justice? He has been duly committed for trial, and ought to be tried, but tried he has not been. Sect. 1, sub-s. 7, empowers the Court to determine this question, and this is one of the special provisions of the Act, whether it be also an ancillary or incidental provision or not. It is a special power of the Court's and the Act specially provides for investing the Court with this power. It is true that the sub-section does not mention the making of orders, but, apart from the point that the order appealed from might have stopped at the word "annulled," and, apart from the effect of s. 20, sub-s. 4, as providing the power to make the actual order required, it seems to me that the power of determining questions, which have to

be determined, is equivalent to power to state what, in accordance with the Act, is the result and effect of the determination.

How was this power exercised in this case? It may be that the Court might have been content to declare that there had been no true trial, leaving the appellant, as a person in custody under the warrant of a committing magistrate, to take his trial in due course of law. If so, part of the order actually made was surplusage, and gave expression to what would have happened, even if it had not been expressed. It may be that the residue of the order should be regarded as a provision for the benefit of, and probably made at the request of the appellant, for it allowed him bail and properly fixed the time, place, and purpose of his surrendering. It is not necessary to express any opinion on these points.

Another "special provision" of the Act is s. 20, sub-s. 4. Its earlier part specially provides for the transference to the Court of Criminal Appeal of the jurisdiction of the Court for Crown Cases Reserved, which had already been vested in the judges of the High Court by 36 & 37 Vict. c. 66, s. 47. The Crown Cases Act, 1848, provided for jurisdiction in relation to questions of law arising in criminal trials. The remainder of s. 20, sub-s. 4, of the Act of 1907 refers to the stating of a case, and is separate from the earlier part, which alone is here material. My Lords, in my opinion this jurisdiction and authority included an authority to provide for just such a case as the present. It is a very necessary authority, which certainly existed before 1907, and for its abandonment without anything to take its place no reason can be assigned. The Court for Crown Cases Reserved was, in matters coming before it, the final tribunal. What it decided, on the construction of the Act which constituted it, even as to its own powers, was subject to no judicial review, and became binding upon the subsequent decisions and procedure of the Court. I think it clear, in spite of what is said in *Rex* v. *Wakefield* (1), that the Court in *Reg.* v. *Mellor* (2) decided by a majority,

(1) [1918] 1 K. B. 216. (2) Dears. & B. 468.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Sumner.

that it had power, where there had been a mis-trial, to set aside any conviction obtained upon it, and to order a proper trial to be had, and this decision was given effect to in *Reg.* v. *Yeadon*. (1) Though a majority of the judges affirmed the conviction in *Reg.* v. *Mellor* (2), it will be found that those, who were of opinion that the Court could award a venire de novo, were actually six, as against five only who declare that there was no such power. Some doubt on the matter was expressed subsequently in *Reg.* v. *Martin*. (3) It was not necessary to the decision, and was, I think, unnecessary altogether, but I am aware that, after the decision in *Rex* v. *Dyson* (4), there was a good deal of difference of opinion in the profession upon the point. In *Rex* v. *Dickman* (5) Lord Alverstone stated, after examining *Reg.* v. *Mellor* (2) and *Reg.* v. *Yeadon* (1), that in his opinion this power had been transferred to the Court of Criminal Appeal. Whether the power was to award a venire de novo or only to order a trial to be had seems immaterial now. Differences of expression on the point (for I will not call them differences of opinion) are to be found in *Reg.* v. *Mellor* (2), but what was ordered in *Reg.* v. *Yeadon* (1) was a venire de novo. In the order made in the present case this term is not used. If there be any distinction, it is in favour of affirming the order now appealed from.

The "jurisdiction and authority" transferred in 1873 and now enjoyed by the Court of Criminal Appeal is that which then existed and could not then be legally questioned. What opinion your Lordships might now entertain on the accuracy of the reasoning of the different judges who gave opinions in *Reg.* v. *Mellor* (2) cannot affect the meaning of the Act of 1907, for it transfers an actual authority, then legally existing, not such authority, be it less or more, as your Lordships might have held to exist before 1907, if you could then have been consulted upon the matter.

I am, therefore, of opinion that one of the "special

(1) L. & C. C. C. 81.
(2) Dears. & B. 468.
(3) 12 Cox C. C. 204.
(4) [1908] 2 K. B. 454.
(5) 74 J. P. 449.

provisions " of the Act of 1907 is to give the Court of Criminal Appeal authority to order the appellant to stand his trial, as it did. Sect. 20, sub-s. 4, does not merely transfer a power as to procedure. It transfers all jurisdiction and authority under the Act of 1848 with respect to questions of law arising in criminal trials and, if such jurisdiction and authority lawfully included the making of such an order as that under appeal, I think a " special provision," within the initial words of s. 4, sub-s. 2, is to be found in s. 20, sub-s. 4.

I also wish to say that I do not agree with the argument for the appellant, that the intention of this Act was to give the Court of Criminal Appeal in an appeal against conviction a choice only between affirmation and acquittal. No satisfactory explanation consistent with such a view can be given of the words: " Subject to the special provisions of this Act " in s. 4, sub-s. 2, nor can I see in what case, on such a construction, any effect can be given to that part of the authority of the Court for Crown Cases Reserved, which consisted in the power laid down in *Reg.* v. *Mellor* (1) and exercised in *Reg.* v. *Yeadon.* (2) In effect the argument would reduce the word " all " in s. 20, sub-s. 4, to " some." On the other hand, though the matter does not strictly arise for decision now, I do not wish it to be supposed that I think that either s. 1, sub-s. 7, or s. 20, sub-s. 4, invests the Court with power to grant new trials independently of such mis-trials as this case illustrates.

My Lords, I think the appeal fails.

LORD PARMOOR. My Lords, the appellant, Crane, was separately indicted for receiving stolen goods, and a man, named Morton, was separately indicted for stealing and receiving the same goods. Owing to some mistake, which was not discovered until the appeal was brought before the Court of Criminal Appeal, Crane and Morton were tried together, as though they had been jointly charged in one indictment. The result is that Crane was not tried on the indictment, on which he had been charged, and the trial is a

(1) Dears. & B. 468. (2) L. & C. C. C. 81.

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Parmoor.

nullity. I think it is impossible to hold, that it is within the competency of any criminal court to try a prisoner on an indictment, which, so far as he is concerned, is non-existent. If the facts had been brought to the notice of an assize judge, or a chairman of quarter sessions, before the assize or sessions had terminated, the mistake could have been rectified, and Crane might have been tried on the separate indictment. No plea of former acquittal, or former conviction, for the same offence could have been effectively raised by him. A trial, void ab initio, cannot result either in acquittal or conviction, and Crane would have stood in the position of an untried prisoner who had been neither acquitted nor convicted on the offence charged against him in the indictment.

The question to be decided in the appeal is, whether on an appeal to the Court of Criminal Appeal, the order of the Court in setting aside and annulling the conviction and judgment on the indictment, and ordering Crane to appear at the next quarter session to be holden in and for the city of Leicester, there to take his trial according to law, upon the separate indictment, admitting him in the meantime to bail upon his recognizance, and upon the recognizances of two sufficient sureties, is an order which the Court has power to make. The case depends upon the construction of the Criminal Appeal Act, 1907. Crane was entitled to appeal under the Act. He was a person against whom a record of conviction stood at the time when he entered his appeal. It was argued on behalf of Crane that an appeal against conviction necessarily comes within s. 4 of the Act of 1907. Sub-s. 2 of this section enacts that the court shall, subject to the special provisions of the Act, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered. The effect of this provision is to maintain as a fundamental principle of the criminal law, that no man should be placed in peril twice for the same offence; but, as stated above, Crane has not in my opinion been in peril, and there has only been a form of trial which is void ab initio. Sub-s. 1 of the section enacts that the court in an appeal against conviction shall allow the appeal if they think that the verdict

of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside upon the ground of a wrong decision of any question of law, or that on any other ground there was a miscarriage of justice, and in any other case should dismiss the appeal. In a void trial there is neither conviction, verdict nor judgment. Crane, therefore, fails to bring himself within the protection of s. 4.

It was argued on behalf of the Crown that sub-s. 7 of s. 1 authorized the Court to make the order which they made in this case. It was necessary, in my opinion, for the purpose of doing justice in the case before the Court, to determine whether the conviction and judgment should be regarded as a nullity, and, in the event of the Court coming to that conclusion, it was their duty so to decide. This covers the first portion of the order. I think that the order would be complete if it stopped at the word annulled, but that a convenient and proper form has been adopted in the direction to the appellant to appear at the next quarter sessions to be holden in and for the city of Leicester, there to take his trial according to law, and that in the meantime he be admitted to bail. The annulling of the conviction, and judgment, would in itself leave the appellant liable to be tried on the separate indictment, but there is no informality in giving a definite direction. The result of the order of the Court of Criminal Appeal is in substance the same as the result which would have followed, if the mistake had been discovered before the termination of the Leicester Quarter Sessions.

Mr. Matthews, who argued the case on behalf of Crane, dealt exhaustively with the history of criminal law, as affected by writs of error, or a writ of "venire de novo." Writs of error have been in terms abolished by the Criminal Appeal Act, 1907. The writ of "venire de novo" is said to have been preserved under sub-s. 4, s. 20. If it were necessary to decide this question, I should be prepared to hold that the Court of Criminal Appeal had a power of issuing a writ of "venire de novo" to the extent that such power had existed

H. L. (E.) 1921 CRANE v. PUBLIC PROSECUTOR. Lord Parmoor.

in the Crown Cases Act, 1848. Two relevant cases were cited to your Lordships. In *Reg.* v. *Mellor* (1) there was a close division of judicial opinion; but in the later case of *Reg.* v. *Yeadon* (2) a "venire de novo" was granted, although Pollock C.B., a member of the Court, had expressed his opinion adversely to the power of the judges to grant such a writ under the Crown Cases Act, 1848, in *Reg.* v. *Mellor*. (1) No subsequent case was quoted. I think, however, it is not necessary either to consider the older cases, or to use the technical expression of a "venire de novo," when a conviction and judgment on an indictment are set aside and annulled by the Court of Criminal Appeal on the ground that all the proceedings at the trial were void ab initio. In my opinion the appeal should be dismissed.

Order of the Court of Criminal Appeal affirmed and appeal dismissed.

Lords' Journals, June 6, 1921.

Solicitor for the appellant: *H. W. Clarkson, for Herbert Simpson & Bennett, Leicester.*

Solicitor for the respondent: *Director of Public Prosecutions.*

(1) Dears. & B. 468. (2) 31 L. J. (M. C.) 70; L. & C. C. C. 81.

[HOUSE OF LORDS.]

JAQUES . . . . . APPELLANT; H. L. (E.)*

1921

AND

July 4.

OWNERS OF STEAM TUG ALEXANDRA RESPONDENTS.

Workmen's Compensation—"Workman"—Master of Steam Tug—"Employment otherwise than by way of Manual Labour"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 7, 13.

In considering whether an employee is "employed otherwise than by way of manual labour" within s. 13 of the Workmen's Compensation Act, 1906, the test is the substantial nature of the employment regarded as a whole. If it be manual labour, the fact that the employment involves duties which are not manual labour does not exclude the employee from the benefit of the Act; if it be not manual labour, the fact that the employment necessitates some amount of manual labour does not bring him within the Act.

The master of a steam tug was drowned by accident arising out of and in the course of his employment. His remuneration exceeded 250*l.* a year. The county court judge found (1.) that the deceased's employment included various kinds of manual labour, such as scrubbing the decks, painting and scraping the ship, and helping to coal, (2.) that, prima facie and apart from special contract, the normal work of a master was not manual labour; and he came to the conclusion that the special conditions of the deceased's employment did not so affect the main and substantial object of his employment as the master of a tug as to turn it into an employment by way of manual labour, and that the deceased was therefore not a workman to whom the Act applied:—

Held that the county court judge had applied the correct test and that there was evidence to support his findings of fact.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming an award of the county court judge of Yorkshire under the Workmen's Compensation Act, 1906.

The appellant, the widow of Harry Jaques, who was employed by the respondents as master of their steam tug *Alexandra*, claimed compensation in respect of the death of her husband.

The steam tug *Alexandra* was a small tug of about 35 tons

* *Present:* LORD BUCKMASTER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

H. L. (E.) 1921 — JAQUES v. STEAM TUG ALEXANDRA. —

burden and was employed on the river Humber. She had a crew of four hands—the master, the mate or deck hand, the engineer, and the fireman. Harry Jaques, while in command of the tug and engaged in an operation of towage off Immingham on the Humber, was drowned on March 13, 1920, by the capsizing of the tug.

The sole question raised by the appeal was whether or not the deceased at the time of the accident was a workman within the meaning of ss. 7 and 13 of the Act.

Sect. 7 provides that the Act shall apply to (among other persons) masters, provided that such persons are workmen within the meaning of the Act. Sect. 13 provides that "'workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year."

The deceased was employed at a remuneration exceeding 250*l.* a year. As part of his employment he had to do various kinds of manual labour, such as scrubbing the decks, scraping and painting the vessel and helping to coal the vessel.

The county court judge, after finding that this work was included in the deceased's employment, found further that the main substantial duties of the master of a tug were prima facie and apart from any particular contract to navigate the ship, to steer her when she was towing, to carry out contracts made by the owners, and on occasions to go seeking at the mouth of the Humber on his own account for ships to tow up, and to make contracts with them for towage and to report those contracts to the owners, and also generally to superintend the discipline, working, and management of the ship, and that prima facie a master having those duties was employed otherwise than by way of manual labour. He then found that the particular conditions of the deceased's employment were that he had to do work which normally a master would not have to do—coaling, washing decks, splicing ropes, and the hooking on and casting off of the tow rope. In considering the proportion of this work to the proper work of a master he said that he could not come to the conclusion that it so affected the main and substantial object of the

deceased's employment as a master of a ship (which prima facie was not manual labour) as to turn it into an employment by way of manual labour. He therefore decided that the deceased was employed otherwise than by way of manual labour and was not a workman to whom the Act applied, and he dismissed the application.

The Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.) held that the county court judge in considering the question whether the deceased was a workman within the meaning of the Act had applied the correct test, and that there was evidence before him to support his findings of fact, and they dismissed the appeal.

1921. June 30; July 1. *Holman Gregory K.C.* and *W. H. Owen* for the appellant. Upon the facts proved before the county court judge the deceased was a workman within ss. 7 and 13 of the Act. The evidence shows that this man's employment involved a preponderance of hard manual labour. Wherever manual labour is an essential part of the service which the man has contracted to perform and for which he receives wages that man is a workman within the Act. [They referred to *Grainger* v. *Aynsley* (1); *Morgan* v. *London General Omnibus Co.* (2); *Yarmouth* v. *France* (3); *Hunt* v. *Great Northern Ry. Co.* (4); *Rushbrook* v. *Grimsby Palace Theatre* (5); *Smith* v. *Associated Omnibus Co.* (6); *Hoddinott* v. *Newton, Chambers & Co.* (7); *Maynard* v. *Peter Robinson* (8); *Walker* v. *Crystal Palace Football Club* (9); *In re Dairymen's Foremen.* (10)] The county court judge misdirected himself in deciding that he had to consider the main and substantial object of the employment of the deceased. The object of the employment is not material to the present question.

Alexander Neilson K.C. (with him *Wilfrid Price* and *L. C. Thomas*) for the respondents. 1. There was evidence to enable the county court judge to find the facts as he did.

(1) (1880) 6 Q. B. D. 182.
(2) (1884) 13 Q. B. D. 832.
(3) (1887) 19 Q. B. D. 647.
(4) [1891] 1 Q. B. 601.
(5) (1909) 25 Times L. R. 258.
(6) (1907) 23 Times L. R. 381.
(7) [1901] A. C. 49.
(8) (1903) 89 L. T. 136.
(9) [1910] 1 K. B. 87.
(10) (1912) 28 Times L. R. 587.

H. L. (E.) 1921 — JAQUES v. STEAM TUG ALEXANDRA.

2. He has not misdirected himself. *In re Dairymen's Foremen* (1) is precisely in point. That was a decision under the National Health Insurance Act, 1911, in which the language is the same except that the wage limit is different.

Holman Gregory K.C. replied.

The House took time for consideration.

July 4. LORD BUCKMASTER. My Lords, the appellant is the widow of Harry Jaques, who at the time of his death was in the employment of the respondents as the skipper of the steam tug *Alexandra* at a remuneration exceeding 250*l.* a year. On March 13, 1920, the tug capsized and three out of the four hands, including Harry Jaques, were drowned. The facts as to the work the deceased man was engaged to perform are accurately and fully stated in the judgments of the Court of Appeal and need not be repeated. The question upon this appeal is whether in the circumstances the learned county court judge is entitled to find, as he has done, that the employment in which Jaques met his death was an employment "otherwise than by way of manual labour." The Workmen's Compensation Act of 1906 contains no definition of "workman," but it expressly declares by s. 7 that the Act is applicable "to masters, seamen, and apprentices to the sea service," "provided that such persons are workmen within the meaning of this Act"; and by s. 13 it enacts that "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year."

The first point that arises for consideration is whether the learned county court judge rightly interpreted the meaning of this exception. The difficulty that arises in the construction of the statute is due to the number of employments in which it is impossible to assert that the employment is solely manual labour or is solely exclusive of manual labour, and it has been held in a series of cases approved in the present instance by the Court of Appeal that in these circumstances the real test is what is the substantial nature of the employment. If

(1) 28 Times L. R. 587.

that be manual labour the fact that there are other duties performed that could not be so described does not take the employee outside the benefit of the statute. If, on the other hand, the substantial part of the employment cannot be described as "manual" labour, the fact that manual work has to be performed does not bring him within. This test, which in my opinion is the only reasonable one that can be applied to the statute, is, I think, the one that was accepted by the learned county court judge, and if that be so, unless the proved facts are of such a character that it was not open to him to hold that by their proper application the deceased was excluded from the Act, his finding is conclusive and cannot be questioned.

Now although the judgment of the learned county court judge does appear in places to assume that the duties of a master of a tug will necessarily take him outside the statute I do not think, fairly regarded, that is the true interpretation of what he said. He appears to me to have considered the duties of a master of a tug apart from questions of manual labour, and to have said that those duties in themselves would involve an employment "otherwise than by way of manual labour," and then to have brought in review the undoubted and varied manual work which the deceased was employed to perform and to have considered whether these duties were sufficient to make manual labour the real and substantial character of his service, and to have concluded that they were not. Thinking, as I do, that he rightly considered the question that he had to solve and that he regarded the facts in their true and proper relationship to this question I am unable to say that the facts are such as to fail to justify his conclusion. I desire, however, to add that I do not consider his judgment as deciding that the master of a tug, whatever may be the terms of his employment, must, of necessity, be outside the Act; so to decide would be to disregard the effect of s. 7. Each case must be determined upon the special circumstances in which it arises, and it is neither easy nor wise, when occupations under the same name differ so greatly in the character of the duties

H. L. (E.) 1921 JAQUES v. STEAM TUG ALEXANDRA.

that they involve, to attempt to codify and classify men as within or without the statute by the mere name of the post which they have undertaken to fill.

For these reasons I think the judgment of the county court judge and of the Court of Appeal is correct, and that this appeal should be dismissed.

LORD SUMNER. My Lords, s. 13 of the Workmen's Compensation Act regards employees as divisible into two categories, those who are employed by way of manual labour, and those who are otherwise employed. Though in form it follows s. 10 of the Employers and Workmen's Act, 1875, it avoids the expression there used—namely, "otherwise engaged in manual labour" and substitutes "employed by way of." Under the former words, though they have not generally been so interpreted, it might be said that a person is engaged in that which he is doing at any particular time in his employment, notwithstanding that, at another time, he might do something else in it. This might have the result, especially as manual labour is not defined, of making it possible to affirm of a given person that sometimes he was and sometimes he was not so engaged as to come within the Act, and as it is the duty of an employee in a vast number of employments sometimes to work with his hands and sometimes with his head only, confusion might result. I think that the words employed "by way of" are substituted for the words "engaged in," so as to make it clear that the general character of the employment is to be looked at. I attach no importance to the particular adjective used, but in considering whether a person is a workman within the Act by reason of his employment one must look to it as a whole rather than to the particular means by which he performs his separate acts of service, which in the aggregate make up that service as a whole. The employment is one employment and under one employer. The person is not employed to work with his hands as one employment, and concurrently to work without them as another. Being in one employment his service sometimes takes one form, sometimes another,

and in most cases and for most of the time takes both forms together. Accordingly the words "by way of" indicate that the service rendered substantially consists of manual labour, notwithstanding that at times, and it may be often, no physical labour is involved. Service "otherwise than by way of manual labour" on the other hand fits the case of a person whose service principally involves the exercise of mental qualities, sometimes with and sometimes without the accompaniment of manual labour. The phrase cannot pretend to be precise, but what else was to be done? If the expression used had been "manual labourer" or "manual worker," it would have been either too narrow or too wide, for "labourer" is a word which has an artificially restricted connotation, while "worker" is as arbitrarily expanded. These terms would, however, clearly have implied that the word "manual" would qualify the employment, whether a labourer's or a worker's, as a whole, even though it did not describe the whole of the employment. For my part I do not question that the expression used—"employed by way of manual labour"—was, indeed, the best that could be found. The Legislature was dealing with a series of problems equally important and intricate, for the forms in which questions as to work, wages, and risks arise in practice are almost infinitely various. The best thing to be done is to endeavour to read its language so as both to conform to established rules of interpretation and to give to the Act a reasonable and just operation.

The cases which were cited were for the most part decisions on the Employers' Liability Act. Even on the words "engaged in" the Courts have almost uniformly looked to the real and substantial work to be done, to the main duty of the employee and the general nature of his employment, to that which is primary and substantial in his operations and not to that which is merely incidental and accessory. They have not fixed their attention simply on manual labour, the performance of which may occasionally be required, irrespective of its relation to the other duties which the workman may be engaged to perform, and the change in the

H. L. (E.) 1921 JAQUES v. STEAM TUG ALEXANDRA. Lord Sumner.

language of the Workmen's Compensation Act above referred to emphasizes this view. The only case absolutely in point is the *Dairymen's Foremen's Case.* (1) The Legislature has not thought fit to define its terms and I offer no attempt at a definition. I think that it would be unprofitable to endeavour to prescribe any particular formula as an authoritative paraphrase of the words of the Legislature, or to specify any invariable test for their application.

My Lords, as for the actual reasoning of the learned county court judge I am unable to see that it is open to any serious criticism. He did not misdirect himself. He appreciated sufficiently the test which s. 13 contains and applied it to the facts before him as I think the Legislature intended it to be applied. He cannot have supposed that the deceased was ipso facto excluded from the benefit of the Act because he was master of the tug, for s. 7 says positively the contrary; nor indeed does he ever say so at all. He did not ignore or even minimise the amount of labour which the witnesses said that the deceased would have to perform, but he measured it against the other duties of his position, as he was bound to do. He never directed his mind to the employers' object in engaging a skipper for the *Alexandra* to the exclusion of what is called the employee's point of view, nor did he close his eyes to the service to be rendered by the deceased and to its incidents and character. The credibility of the witnesses and the weight of their evidence were both for him, and it was for him also, in a question of degree dependent on the facts proved, to draw the line in this particular case between employment by way of and employment otherwise than by way of manual labour. I need not detain your Lordships with any detailed analysis or citation of the language of his award.

The argument resolutely and ably advanced by the junior counsel for the appellant is further deserving of careful examination. He contended that, in spite of numerous decisions to the contrary, s. 13 in effect classes as workmen within the Act all persons employed to serve by manual

(1) 28 Times L. R. 587.

labour at all, except, indeed, when the amount of it is inappreciable; whence it followed that as the deceased was constantly working with his hands and had to show the way to those under him, as primus inter pares, his labour, often truly laborious, was such as to make him a workman many times over, regardless of any proportion that it might bear to other and different duties. It is true that the latter part of the section which, after the exceptions have been stated, declares generally what is included in the word "workman," appears to contemplate three categories of persons who are classified according as their service is manual, clerical, or something different from either, and saves from the consequences involved in the receipt of a remuneration of over 250*l.* a year one only of these three classes—namely, persons employed by way of manual labour. This, it was said, is because that class of persons is exposed to risks not only higher in degree but different in kind from the risks of clerical or other employees. If further stress is laid on the word "labour" as something more arduous and more perilous than mere "work" (for which I fail to find any real warrant) the result, according to this view, emphasizes the reason for marking off this class as specially favoured and as unaffected by the limit fixed for the remuneration of others.

My Lords, in spite of the strong appeal made on its behalf, I think that this construction fails in limine. We cannot go beyond the words of the section. It might have said that workman means any person in the service of an employer who is paid up to 250*l.* a year, and, in the case of a person whose service involves any manual labour, without limit of amount, but it does not. Worded as the section is worded I think it must be open to an arbitrator, if the facts raise such a case, to say that, on a survey of the service as a whole, a person is employed otherwise than in manual labour, even though to some extent, which I need not try to particularise, he also labours manually as part of his employment. This was the way in which the arbitrator dealt with this case. I think, therefore, that the appeal fails.

H. L. (E.) 1921 JAQUES v. STEAM TUG ALEXANDRA.

LORD PARMOOR. My Lords, the appellant is the widow of Harry Jaques. Harry Jaques at the time of his death was in the employment of the respondents as master of the steam tug *Alexandra*, a small steam tug of about 35 tons burthen. He was employed under a contract which gave him no alternative but to do work of a manual character, such as washing decks, scraping and painting the vessel, and coaling. The arbitrator finds that this manual work was included in, and formed part of, his employment. The arbitrator, however, further finds that the main portion of the deceased's work was not by way of manual labour, and that the deceased was "employed otherwise than by way of manual labour," and therefore that his widow is not entitled to an award in her favour. The matter to be determined in the appeal is whether the arbitrator applied the accurate test in his construction of the words "employed otherwise than by way of manual labour" in s. 13 of the Act of 1906. If he did, his finding is simply one of fact and is not open to question.

It was argued by counsel on behalf of the appellant, that the claimant was entitled to compensation in all cases in which the employment included work, not negligible in quantity, by way of manual labour which was not accessory to, but an integral part of, the employment. If this construction is accurate the appellant would succeed in the appeal, but I think it is not accurate and that to adopt it would be to include a number of employments, which are in no sense employment by way of manual labour. Moreover, a strict construction of the words would be applicable against the claimant, whose husband certainly was to some extent employed in labour "otherwise than by way of manual labour." The test to be applied under s. 13 of the statute is the character of the employment regarded as a whole. There will be cases in which the determination is not easy, and in which much may be said on either side. The arbitrator has to ask himself whether the employment, regarded as a whole, would normally, and in the ordinary sense, be regarded as "employment otherwise than by way of manual

labour" although it necessitates, in its performance, some amount of work by way of manual labour. No doubt a powerful factor is the proportion, and importance, of manual labour to be employed under the contract of employment; but this is not the only consideration, and it is not possible to make, or desirable to attempt to make, any exhaustive analysis of all the relevant considerations. The question in each case is one of fact, so long as the arbitrator does not misconstrue the statute and there is relevant evidence on which the award is based.

My Lords, in my opinion the appeal should be dismissed.

LORD WRENBURY. My Lords, the only question for this House is whether the learned county court judge went wrong in law—whether he misconstrued the statute and asked himself the wrong question. If he did not we are not concerned to inquire whether his finding of fact was right or wrong if there was evidence to support it.

The words to be construed are "'Workman' does not include any person employed otherwise than by way of manual labour." Suppose X is employed by way of manual labour and of other work. If I ask A whether X is employed otherwise than by way of manual labour he may reply, "No: X is employed by way of manual labour although he does other work also." A understands the Act as if the words were "employed in work which does not include manual labour." If I ask B the same question he may reply, "Yes, for although X does manual labour he does other work also." B understands the Act as meaning that a man employed in both manual labour and other work is employed "otherwise than in manual labour" because he is employed in manual labour and more. Neither A nor B would, I think, be construing the Act rightly. If A does some skilled or intellectual work it does not follow that he is, and if he does some manual labour it does not follow that he is not, "employed otherwise than by way of manual labour." The question to be answered I think is this: When the employer offered and the man accepted the employment was it

H. L. (E.) 1921 JAQUES v. STEAM TUG ALEXANDRA. Lord Wrenbury.

substantially an offer of manual labour although it involved some other work, or was it an offer of other work although there was attached to it an obligation to do some manual labour? To put this particular case: Was the employment that of master of the tug with the duties and responsibilities attaching to that office but coupled with an obligation to take part with the crew in the manual work, or was the employment that of a manual labourer who was to be responsible for the tug as senior man among the crew? As I read the judgment that was really the question which the learned judge put to himself. There was, I think, no misdirection. The question was one of fact, and this appeal must be dismissed.

LORD CARSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 4, 1921.

Solicitors for the appellant: *Wm. C. Dawson & Loncaster, London and Hull.*

Solicitors for the respondents: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

[PRIVY COUNCIL.]

AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY, LIMITED . . } APPELLANTS;

AND

HUNT . . . . . RESPONDENT.

J. C.* 1921 June 17.

ON APPEAL FROM THE SUPREME COURT OF FIJI.

Shipping—Bill of Lading—Statutory Provisions—Seaworthiness—Clause requiring Notice of Claim—Weakening or lessening Shipowners' Obligation—Sea-Carriage of Goods Ordinance, No. XIV. of 1906, *Fiji, s.* 4.

Fiji Ordinance XIV. of 1906 (which is substantially identical with the Sea-Carriage of Goods Act, 1904, of Australia) provides by s. 4 that where any bill of lading contains any clause whereby the obligation of a shipowner (inter alia) to make and keep the ship's refrigerating chambers fit for the carriage and preservation of the goods should in any wise be weakened, lessened, or avoided, that clause shall be illegal and void. By s. 5 parties to a bill of lading are to be deemed to have intended to contract according to the laws in force at the place of shipment. By s. 7, sub-s. 1, a warranty of seaworthiness at the beginning of the voyage is to be implied.

Bananas were shipped from Fiji under a bill of lading, which provided that no claim for loss or damage should be enforceable unless made within seven days from the date at which the cargo was, or should have been, landed. The bananas were damaged owing to the ship being unseaworthy in that, both at the commencement and during the continuance of the voyage, the refrigerating chambers were defective. The shippers sued to recover damages, but had failed to claim within seven days:—

Held, that the clause in the bill of lading above referred to weakened or lessened the shipowners' obligation, and therefore was void under s. 4 of the Ordinance; and that the shipper was entitled to damages.

Judgment of the Supreme Court of Fiji affirmed.

APPEAL from a judgment of the Supreme Court of Fiji (October 21, 1919).

The respondent brought an action against the appellants in the above mentioned Court claiming damages for negligence and breach of duty in the carriage of bananas shipped in the appellants' steamship *Levuka* from Fiji to Australia. The bananas were carried under two bills of lading containing the same conditions.

The facts and the material terms of the bills of lading and

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD PHILLIMORE.

J. C.
1921
AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. v. HUNT.

of Fiji Ordinance XIV. of 1906 (the Sea-Carriage of Goods Ordinance, 1906) appear from the judgment of their Lordships.

The action was tried by Sir C. S. Davson C.J. who found that the damage was due to the unseaworthiness of the ship, in that the insulating apparatus was defective both at the commencement of and during the voyage. He held that the conditions in the bills of lading did not apply, since the action was in respect of an implied and not an express warranty, and gave judgment for 547*l.* 14*s.* The findings of facts were not disputed upon the appeal.

1921. May 27, 30. *R. A. Wright K.C.* and *Simey* for the appellants. Condition 17 of the bill of lading applied to the respondent's claim in the action, and the failure to give notice of claim as required was a good defence. The condition applies, although the claim was in respect of a breach of the warranty of seaworthiness. The view that a condition affecting a claim for a breach of the warranty of seaworthiness applies only when the warranty is expressed in the bill of lading has been given effect to only in *Tattersall* v. *National Steamship Co.* (1); that distinction did not form the basis of the decision of the Court of Appeal in *Bank of Australasia* v. *Clan Line.* (2) In that appeal *Tattersall's Case* (1), *Morris* v. *Oceanic Steam Navigation Co.* (3) and *Wiener* v. *Wilson Line* (4) were considered; it is submitted that the view of the Court of Appeal was that the question was one of construction of the particular bill of lading. In any case *Tattersall's Case* (1) is distinguishable, as the condition there limited the liability itself. If however the distinction drawn in *Tattersall's Case* (1) is a test, here, having regard to the terms of the Ordinance and of the bill of lading, the warranty was an express part of the contract as completely as if it had been set out in the bill of lading. Secondly, the condition as to notice was not void under s. 4 of the Ordinance. It did not weaken or lessen the obligation, but merely imposed a

(1) (1884) 12 Q. B. D. 297.
(2) [1916] 1 K. B. 39.
(3) 16 Times L. R. 533.
(4) (1910) 15 Com. Cas. 294.

condition for suing for a breach of it. Decisions in the United States with regard to similar clauses in relation to the Harter Act support the appellants: *The Persiana* (1); *The Westminster* (2); *The St. Hubert.* (3) In *Morris* v. *Oceanic Steam Navigation Co.* (4) Mathew J. was under the mistaken belief that the Harter Act, like the Ordinance now in question, contained a positive enactment of a warranty of seaworthiness. The decision strongly supports the appellants. In *Hordern* v. *Commonwealth and Dominion Line* (5) the clause did not merely impose a condition but purported to affect the liability itself. The condition in this case presupposes a liability.

Leslie Scott K.C. and *T. Mathew* for the respondent were not called upon.

June 17. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is the appeal of the defendants in an action from a judgment of the Supreme Court of Fiji. The claim in that action was for damage suffered by a consignment of bananas shipped by the respondent on a vessel belonging to the appellants. It was adjudged that the respondent should recover 547*l.* 14*s.* and costs.

The respondent is a planter residing and carrying on business in Fiji. The appellants are shipowners. No question now arises as to the fact of damage or the amount, or of such damage having been due to the unseaworthiness of the appellants' vessel, the *Levuka*, on which the bananas were shipped in Fiji for delivery in Australia. The unseaworthiness consisted in the defective condition of the refrigerating chambers of the vessel, as established. But a question which remains is whether, by the terms of the two bills of lading, under which the fruit was carried, the appellants are freed from liability.

Before considering the terms of the bills of lading, their Lordships think it important to refer to the provisions of the Fiji Ordinance of 1906 relating to the sea carriage of goods.

(1) (1911) 185 Fed. Rep. 396.
(2) (1904) 127 Fed. Rep. 680.
(3) (1901) 107 Fed. Rep. 727.
(4) 16 Times L. R. 533.
(5) [1917] 2 K. B. 420.

J. C. 1921 AUSTRAL-ASIAN UNITED STEAM NAVIGATION Co. v. HUNT.

This Ordinance follows in substance the analogy of the well-known Harter Act of the United States, as well as that of the Sea-Carriage of Goods Act, 1904, of the Australian Commonwealth.

The Ordinance enacts (s. 4): "Where any bill of lading or document contains any clause, covenant or agreement whereby (*a*) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability from loss or damage to goods arising from the harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or arising from negligence, fault or failure in the proper loading, stowage, custody, care or delivery of goods received by them, or any of them, to be carried in or by the ship; or (*b*) any obligations of the owner or charterer of any ship to exercise due diligence and to properly man, equip and supply the ship, to keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise weakened, lessened or avoided; or (*c*) the obligation of the masters, officers, agents or servants of any ship to carefully handle and stow goods and to care for, preserve and properly deliver them, are in any way lessened, weakened or avoided, that clause, covenant or agreement shall be illegal, null and void and of no effect."

By s. 5 the parties to any bill of lading are to be deemed to have intended to contract according to the laws in force at the place of shipment. By s. 7, sub-s. 1: "In every bill of lading with respect to goods a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects, and properly manned, equipped and supplied."

The bills of lading provided that the goods were received for shipment subject to the terms, conditions and exceptions indorsed on the back, which were to form part of the contract. Along with these was a provision that the appellants received the goods to be forwarded subject to any statutory exemptions and limitations, and on the terms contained in the document, but that such terms were to be construed as

qualified by the provisions of the Sea-Carriage of Goods Act, 1904, already mentioned, which, as their Lordships have observed, is substantially the same in its provisions as the Fiji Ordinance of 1906. Among the terms indorsed were the exemption of the appellants from liability for loss or damage due to accidents arising from defects in the fittings or appurtenances of the ship. There was also a clause (No. 17) under which any claim for loss or damage to goods was to be restricted to the wholesale cash value at the port of discharge and must be made in writing within seven days from the date at which the cargo was or should have been landed. Otherwise such claim was not to be enforceable.

Reading the terms of the Ordinance, which are controlling, into those of the bills of lading, it is obvious that if the latter conflict with the former the former must prevail. This being so, the first question which arises is whether there was imported into the bills of lading an obligation on the owners that the ship should be seaworthy, and in particular that the refrigerating chambers should be in adequate condition for the transport of the bananas. It is clear that this question must be answered in the affirmative, and that if the bills of lading contained any stipulation inconsistent with such a provision, the stipulation was inoperative.

The second question is whether the bills of lading actually contained any such inconsistent stipulation. What happened was that when the ship arrived at Sydney and Melbourne, her ports of destination in Australia, the fruit turned out to have been damaged on the voyage by the imperfect condition of the insulating chambers. But the respondent did not give notice of his claim within seven days of the arrival of the *Levuka* at the ports of discharge, and if the condition as to the necessity for this in clause 17 of the bills of lading was operative, that fact would have exonerated the appellants from liability. The point is, therefore, whether the terms of the Ordinance have rendered the condition as to notice inoperative. Their Lordships think that this question must be answered in the affirmative. Reliance was placed for the appellants on decisions in the Courts of

J. C.
1921
AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. v. HUNT.

the United States, such as those in the cases of *The Persiana* (1) in 1911, *The Westminster* (2) and *The St. Hubert* (3), to which their Lordships would have attached much importance had the question been in reality analogous to that which arises in the appeal before them. But there the provision in the bills of lading was merely that the owner was not to be held liable for any damage to goods, notice of which was not given before the removal of the goods. This was held not to be inconsistent with the provisions of the Harter Act. In the case of such a provision it may be that it can be treated as not affecting the substantial right which that Act gives, but as restricted to the character of the evidence by which it is to be established, and therefore as confined to procedure and as not extending to interference with substantive title. In the present case the conditions contained in clause 17 are that the claim is not only to be restricted, but that it must be made in writing and within seven days from the date of landing of the cargo. Their Lordships are of opinion that such conditions affect the substance of the right conferred by the Fiji Ordinance, which is to treat as void any condition by which the absolute right to recover for damage due to failure to keep the refrigerating chambers in good condition was "in any wise weakened, lessened or avoided." On this question the judgment of Horridge J. in *Hordern* v. *Commonwealth and Dominion Line* (4) is instructive.

Their Lordships might have called upon the respondent for an argument upon a further point which was argued, but in the view which they take on the question under s. 4 of the Ordinance, which goes to the root of this appeal, they are of opinion that it is unnecessary to pronounce upon it.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Waltons & Co.*
Solicitors for respondent: *Murray, Hutchins & Co.*

(1) 185 Fed. Rep. 396.
(2) 127 Fed. Rep. 680.
(3) 107 Fed. Rep. 727.
(4) [1917] 2 K. B. 420.

[PRIVY COUNCIL.]

FERNANDO . . . . . APPELLANT;

AND

GUNATILLAKA . . . . . RESPONDENT.

J. C.* 1921 June 28.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Roman-Dutch Law—Ceylon—Sale by Person who has no Title—Subsequent Acquisition of Title—Title of Purchaser—Res judicata—Land Acquisition Amendment Ordinance (No. 44 of 1917, Ceylon).

Under Roman-Dutch law as applied in Ceylon where a vendor sells without title, a title subsequently acquired by him accrues to the purchaser and prevails over that of a donee under a transfer made by the vendor after the sale. The rule applies not only if there has been delivery of possession to the purchaser, but also if a duly executed deed has been delivered to him and registered. The principle under Roman-Dutch law is wider than the analogous principle in the English common law, in that it is not based upon an estoppel by the recitals in the deed.

Quaere, whether a title so accruing would prevail over that of a bona fide purchaser without notice.

Quaere, whether under Roman-Dutch law a contingent interest in land can be alienated; it may be that a transfer is effective to put the transferee "in loco procuratoris."

The Land Acquisition Amendment Ordinance (No. 44 of 1917, Ceylon), which provides that a determination of title in land acquisition proceedings shall not operate as res judicata except as to the portion of land acquired, is not retrospective in effect.

In 1882 M. F. conveyed property in Ceylon to her son P., subject to a fidei commissum in favour of her sons S. and N., if P. died without issue, and subject to a life interest in herself. In 1895 S. and N., before their title had accrued under the fidei commissum, sold to the respondent's predecessor and by deed purported to transfer to the purchaser either the whole property or their interest in it. The deed was duly witnessed and registered in accordance with the laws of Ceylon. In 1913, after a title had accrued to S. and N. under the fidei commissum, they transferred the property by deed of gift to the appellant, who had notice of the deed of 1895. The appellant was in possession:—

Held, that the respondent was entitled to eject the appellant.

Rajapakse v. *Fernando* [1920] A. C. 892 discussed and followed.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL from a judgment and decree of the Supreme Court of Ceylon (December 19, 1919) setting aside a decree of the District Court of Colombo (August 1, 1919).

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD PHILLIMORE.

J. C. 1921 FERNANDO v. GUNATILLAKA.

The suit was instituted by the respondent who claimed a declaration of her title to certain land in Ceylon, and that the appellant should be ejected therefrom.

The material facts of the case appear from the judgment of the Judicial Committee. Both the appellant and the respondent relied upon two titles to the property, but the substantial conflict arose with regard to the respective titles appearing shortly in the latter part of the headnote. The deeds of 1882 and 1895 there referred to are fully set out at pp. 361, 369.

The District Judge dismissed the suit. Upon an appeal to the Supreme Court that decision was reversed, and a decree made declaring the respondent's title and ejecting the appellant. The grounds of the decisions in Ceylon appear shortly from the judgment of the Judicial Committee, and the judgments both of the District Judge and of the learned Judges in the Supreme Court are fully reported at 21 Ceylon N. L. R. 257.

1921. May 31; June 2, 3, 6. *Romer K.C.* and *R. G. N. Combe* for the appellant. The appellant established a good title. First, under the deed of December 5, 1893. Palis had power under the deed of 1882 to convey the land with the concurrence of Maria Felsinger, and she was a party to the deed of 1893. The decision in 1913 in the land acquisition proceedings does not estop the appellant. The Land Acquisition Amendment Ordinance (No. 44 of 1917) provides that a decision is not to be res judicata except as to the land actually acquired. That Ordinance applies, although the decision in question was given before its enactment. The Ordinance was as to a matter of procedure, and such enactments are ordinarily to be construed retrospectively. Secondly, the appellant has a good title under the deed of 1913. The deed of 1895 relied on by the respondents conveyed no title. At that time the grantors, Stephen and Nicholas, had only a contingent interest in the property. The judgments of both Courts in Ceylon assume that a contingent interest cannot be transferred under Roman-Dutch law in Ceylon; there is no authority conflicting with that

view. The decision of the appellate Court that the title acquired by Stephen and Nicholas on the death of Palis in 1896 accrued to the grantee under the deed of 1895, and entitled the respondent to eject the appellant, was erroneous. No doubt it was held by the Board in *Rajapakse* v. *Fernando* (1) that "by the Roman-Dutch law as existing in Ceylon, the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, 'feeds the estoppel.'" That doctrine however does not apply in the circumstances of this case. The vendors under the deed of 1895 described themselves as having a title by inheritance, and purported to convey that title; but the interest which they subsequently acquired was acquired not by inheritance but under the deed of 1882. In those circumstances no title passed to the purchaser: *Smith* v. *Osborne*. (2) In that case the decision in *Noel* v. *Bewley* (3), which was similar to that in this case, was disapproved. In English law two principles are applied—namely, the common law principle of feeding the estoppel, based on *Doe* v. *Oliver* (4), and the analogous equitable principle. By the latter principle effect is given to the original contract. The common law principle depends solely upon an estoppel by recitals in the first deed, and operates only when the recitals contain a precise statement of the vendor's title: *Heath* v. *Crealock* (5); *General Finance Co.* v. *Liberator Building Society* (6); *Poulton* v. *Moore*. (7) The recitals in the deed of 1895 are too vague to give rise to an estoppel. The equitable principle applies only when the first deed amounts to an unambiguous agreement to convey a precise estate which afterwards accrues to the grantor. *Smith* v. *Osborne* (2); *In re Harper's Settlement* (8), and cases there cited. In this case, as already submitted, there was no

(1) [1920] A. C. 892, 897.
(2) (1857) 6 H. L. C. 375.
(3) (1829) 3 Sim. 103.
(4) (1829) 5 Man. & Ry. 202; 2 Sm. L. C., 11th ed., p. 724.
(5) (1874) L. R. 10 Ch. 22.
(6) (1878) 10 Ch. D. 15.
(7) [1915] 1 K. B. 400, 414.
(8) [1919] 1 Ch. 270.

J. C. 1921

FERNANDO v. GUNATILLAKA.

identity between the title acquired and that asserted in the deed of 1895.

De Gruyther K.C. and *Lilley* for the respondent. This case depends upon Roman-Dutch law as applied in Ceylon, not upon English law. So far as the appellant claims under the deed of 1893, he is estopped by the decision in the land acquisition proceedings. The Ordinance of 1917 cannot be construed retrospectively especially seeing that it dealt with other matters. The judgment of the Supreme Court that under the deed of 1895 the purchasers obtained a good title upon the vendors subsequently obtaining a title is correct. The title accrued to the purchasers "automatically": *Rajapakse* v. *Fernando*. (1) By the deed of 1895 Stephen and Nicholas conveyed all the interest which they had in the property now in suit. It was not suggested in the Courts in Ceylon that under the system of conveyancing there used, there could not be a transfer of a contingent interest: see Pereira, Laws of Ceylon, 2nd ed., pp. 429, 457; Morrice, Roman-Dutch Law, pp. 312, 315. But, in any case, the Supreme Court rightly held that the respondent was entitled to succeed under the exception rei venditae et traditae. If the principle applies in Ceylon when the vendor has no title, it certainly must do so when he has an interest which, at the date of the deed, he cannot convey. This case differs from *Rajapakse* v. *Fernando* (1) only in that the purchaser did not obtain actual possession. The view of the Supreme Court that the handing over of a duly executed deed, which is registered, has the effect of traditio, is submitted to be correct. The English cases are not relevant. It is however submitted that under them the respondent would succeed.

Romer K.C. replied.

June 28. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The suit out of which the present appeal arises concerns the title to certain properties in Colombo. It was brought by the present respondent seeking to acquire possession as against the appellant.

(1) [1920] A. C. 892.

One Maria Felsinger by a notarial instrument or deed poll, dated September 23, 1882, instituted a fidei commissum which so far as is material is in the following terms: "Know all men by these presents that I Maria Felsinger of Colpetty in Colombo, widow of Swarisge Marsalinoe Swaris in consideration of the natural love and affection which I have and bear unto my son Swarisge Palis Swaris, otherwise called Punchimahatmaya also residing at Colpetty in Colombo of the age of 16 years and for divers other good causes and considerations me hereunto specially moving do hereby give, grant, and assign transfer and set over unto the said Swarisge Palis Swaris his heirs, executors, administrators and assigns as a gift absolute and irrevocable under and subject to the conditions and reservations hereinafter mentioned all my share right, title and interest in and to"—then the property is described—"together with all deeds and writings relating thereto and with all my right, title and interest therein and thereto. To have and to hold the said premises with the easements, right and appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto him the said Swarisge Palis Swaris, his heirs, executors, administrators and assigns for ever subject however to the following conditions and reservations that the said Maria Felsinger, shall have the right of possessing and enjoying the rents, income, produce and issues of the said lands and premises until the said Swarisge Palis Swaris shall have arrived the age of 25 years, and that after the said Swarisge Palis Swaris shall have arrived the said age of 25 years, if I the said Maria Felsinger shall be then living then the said Swarisge Palis Swaris shall not be at liberty to sell mortgage or alienate the said lands and premises during my lifetime but shall only possess and enjoy the rents, income and produce thereof, but that if the said Maria Felsinger shall die before the said Swarisge Palis Swaris shall have arrived at the said age of 25 years then the said Swarisge Palis Swaris shall only possess and enjoy the rents, produce and income of the said land and premises but shall not be at liberty to sell, mortgage or alienate the

J. C. 1921 FERNANDO v. GUNATILLAKA.

same until he shall have arrived the said age of 25 years, and that if the said Swarisge Palis Swaris should die without lawful issues then the said lands and premises shall devolve and go to his two brothers Swarisge Stephen Swaris and Swarisge Nicholas Swaris or to their lawful issues provided that I the said Maria Felsinger shall have the right to possess and enjoy the rents produce and income of the said lands and premises during my lifetime, but if the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris . . . . should die without any issues then the said land and premises shall revert and devolve on me or my lawful heirs, but if one of them shall die without issues then both the said lands and premises shall devolve on the surviving brother whether he shall have any issue or not and if he shall also die without issue then the said lands and premises shall devolve on me or my heirs. . . . . And I, Elias Perera Senewiratne, do hereby thankfully accept and receive the above gift and on behalf of the said Swarisge Palis Swaris, subject to the aforesaid conditions and reservations."

The instrument was duly registered. Its construction and effect has given rise to much litigation, both parties to the present suit claiming titles under it.

The narrative of what has since happened is as follows. The son, Palis, attained the age of 25 in 1891, but died without issue in 1896. His mother married a second husband, Daniel John Fernando, and died in 1916. The other sons, Stephen and Nicholas, are assumed to be still living. Palis, on October 23, 1893, purported to mortgage the property to Francis Perera Wanigeratne. The mortgagee put up the property for sale, and it was bought by Charles Perera, who obtained a transfer from the fiscal on July 24, 1903.

On December 5, 1893, Palis, with the consent of Maria, purported to sell the property to Daniel John Fernando. On May 23, 1895, Stephen and Nicholas made a deed of transfer either of the whole property or of their interest in it, or of some interest in it, to one Don Cornelis Appuhamy, for the sum of Rs.1000. The nature of the interest transferred will be discussed later. Don Cornelis, on February 2,

1905, transferred his interest in the property to Charles Perera. Lastly, on December 17, 1913, Stephen and Nicholas, by a deed of gift, transferred the property, subject to a reservation for the benefit of Maria during her life, to the defendant appellant, Lionel Oswin Fernando, who is a son of Daniel John Fernando. Under certain dispositions then made, Lionel Oswin's interest passed to other members of the family and then came back to him. It is unnecessary to deal with these dispositions. The result is that the defendant appellant has two lines of asserted title to the property. The plaintiff respondent has also two lines of asserted title. She claims as executrix of James Perera who was executor of Charles Perera.

On August 31, 1909, Daniel John Fernando sued James Perera as the executor of Charles for the possession of the property. He relied on the deed of December 5, 1893, by which Palis, with the consent of Maria, purported to transfer the property to him. The defendant traversed the plaintiff's claim and further relied upon the mortgage, made two months earlier on October 23, 1893, and the purchase by his testator Charles Perera at the auction sale and the transfer from the fiscal. The case was decided in favour of the defendant by the District Judge, but his decision was reversed by the Court of Appeal, and this reversal was sustained when the case came before their Lordships' Board. The decision of their Lordships established that the mortgage of October 23, 1893, was ineffectual, because Palis was prohibited from alienating the property, at any rate during the lifetime of Maria, and thereby the first line of title by which the plaintiff might claim is destroyed. With regard to the claim of Daniel John Fernando the Supreme Court of Ceylon and the Privy Council held that the deed of December 5, 1893, was effectual to transfer Maria's life interest, and that by virtue of that transferred life interest he could claim possession. As their Lordships observed no ulterior rights were brought into the case.

The next thing that happened was that in 1909 the Crown acquired under a Land Acquisition Ordinance a small part

J. C.
1921
FERNANDO
v.
GUNATIL-
LAKA.

of the land in question and paid the compensation money for it into Court. Thereupon both Daniel John Fernando and James Perera claimed the money, and the District Court again decided in favour of James Perera. The Supreme Court set aside this judgment, and declared as in the previous case that Daniel John Fernando was entitled to the interest during the lifetime of Maria. But the Court proceeded to decree and declare that on the death of Maria James Perera would be entitled to the sum. The learned judges decided the question left open in the previous case, as to the ulterior rights of the parties after the death of Maria. They held that the restriction of alienation in the original fidei commissum did not operate merely to protect the life interest of Maria but also to protect the contingent gift to Stephen and Nicholas, and that the deed of December 5, 1893, was only effectual in so far as it transferred the life interest of Maria, and that Palis could not, even with the consent of Maria, make an effectual transfer of the property out and out. This judgment was not appealed from, and is relied upon by the plaintiff as constituting a res judicata; and subject to one observation it would so operate and bind Daniel John Fernando and all persons claiming under him, and thus would destroy the first line of title of the defendant appellant. But it would not bind Stephen and Nicholas who were not parties to the proceedings and therefore would not bind the defendant so far as he claims through his second line of title.

A contention was, however, raised on behalf of the defendant which would have the effect of taking this decision out of the category of res judicatae. It was said that by an amending Land Acquisition Ordinance of 1917 decisions as to the title to small sums of money paid into Court by the Government are not to operate as decisions effecting the title to the remaining bulk of the property, and that the effect of this Ordinance was retrospective, and that the sum paid into Court in this particular case being within the protected limit, this particular decision did not operate as a res judicata. Their Lordships cannot take this view. The effect of the

amending Ordinance was not merely to establish this provision. The provision was part of a scheme under which the decision as to title to small sums was taken away from the District Courts with an appeal to the Supreme Court and sent to the Court of Requests, and it is probably for this reason that these decisions are not to bind the bulk of the property. The two provisions cannot be separated; and even supposing that in other circumstances the Ordinance of 1917 might have been construed as retrospective, these circumstances make it clear that it was prospective, and accordingly the rule of res judicata applies.

This leaves the parties each so far in possession of their second lines of title. As to the defendant his title under the transfer of December 17, 1913, effected by Stephen and Nicholas is not questioned. If Stephen and Nicholas had any interest left to transfer they effectually transferred it by that deed.

But if the deed of May 23, 1895, executed between Stephen and Nicholas as transferors and Don Cornelis as transferee was effectual, that transfer, being long prior to the transfer to the defendant, must prevail for the purposes of the present suit; and the main argument before their Lordships' Board has turned upon the validity and the effect of the deed of May 23, 1895.

The District Judge decided against it, in a very careful judgment. He held that Stephen and Nicholas had at the time no title to convey. He then inquired whether the plaintiff was entitled to rely upon the title acquired by Stephen and Nicholas after the death of Palis although she had not got a conveyance after the title had been acquired, and although she was out of possession. He held that she could not and dismissed the action.

On appeal equally careful and very learned judgments were given in the Supreme Court, which came ultimately to the conclusion that the plaintiff could rely without more upon the two facts that her predecessor in title had had a conveyance from Stephen and Nicholas, and that though Stephen and Nicholas had nothing which at the time they could

J. C. 1921 FERNANDO v. GUNATIL-LAKA.

convey, their subsequent acquisition without more enured to the benefit of their transferee and made the original transfer operative as from its date, and consequently that the title of the plaintiff prevailed over that of the defendant. In the argument before their Lordships' Board these points have been elaborately discussed, and their Lordships have derived great benefit from the arguments on both sides. The matter has also been presented on a somewhat different line. Counsel for the defendant submitted that Stephen and Nicholas by the deed of May 23, 1895, had not purported to convey this property or purported to convey the contingent interest to which they were entitled under the fidei commissum, but imagined that they had certain present particular shares or interests derived under another title and had conveyed these non-existent shares and interests only.

During the course of the argument much reliance was placed on certain English decisions regarding the law of estoppel and on the decision of this Board in the case of *Rajapakse* v. *Fernando*. (1) By the English law of estoppel, which was a good deal relied upon in the Courts below and which is referred to in the case of *Rajapakse* v. *Fernando* (2), "where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, 'feeds the estoppel.'" By this doctrine the estoppel is derived from the recitals of title contained in the conveyance, and it is these recitals and these only which the grantor has to make good, so that if he subsequently acquires the ownership of the property by some other title the subsequently acquired interest does not feed the estoppel so as to make the original conveyance effective as against a third party. If, therefore, the provisions of English law were to be applied to this case there would be much to be said in favour of the defendant, as the recitals in the transfer of 1895 stated a title which the transferors never acquired.

It appears, however, to their Lordships that though there

(1) [1920] A. C. 892. (2) Ibid. 897.

is a considerable analogy between the doctrine of English law as to conveyance by estoppel, as this Board thought in the case of *Rajapakse* v. *Fernando* (1), the doctrine of the Roman-Dutch law which prevails in Ceylon is not identical with that of the English law. The mode of reasoning by which it is reached is different, and the conclusions are not necessarily the same. In all civilised systems of jurisprudence there are many common principles and many historical processes of development which are very similar, and light may often be thrown from one system upon another, but when this is done the comparison must be handled with care. There is, perhaps, a special danger with a Court constituted mainly of judges trained under the English system of a too hasty assumption that some foreign system is in a particular matter identical. Their Lordships, therefore, while not neglecting the benefit afforded by English decisions, have considered that their attention must principally be directed to the Roman-Dutch law as governing this case.

This law admitted what was called the exceptio rei venditae et traditae (Dig. lib. XXI., tit. 3). Under this exception the purchaser who had got possession from a vendor who at the time had no title could rely upon a title subsequently acquired by the vendor not only against the vendor but against any one claiming under the vendor; and though delivery (traditio) was as the title shows a part of the defence, if the purchaser had acquired possession without force or fraud he could use the exception though he had never received actual delivery from the vendor. Also if he had once been in possession without force or fraud, and had since lost possession, he could recover it by the Publician action, using the exception as a replication to any defence set up by the vendor or those claiming title under him. (See Voet, Commentary on the Pandects, lxxi., tit. 3.) The principal passages are given in a translation in a note to *Rajapakse* v. *Fernando*. (1) The principle does not rest upon estoppel by recital and is broader in its effect than the English rule.

Still the exceptio given by the Roman law required the

(1) [1920] A. C. 892.

J. C. 1921 FERNANDO v. GUNATIL-LAKA.

double condition not only that the property should be sold, but that it should be delivered, though the delivery might in the case mentioned be presumed by a fiction; and here there was no delivery of the property and the plaintiff is not and never has been in possession. This objection is that which impressed itself upon the mind of the District Judge. The Supreme Court, however, have thought that in this particular the Roman-Dutch law as administered in Ceylon has made a further stride.

The early Roman law, with its simpler methods of business, might be expected to receive modification under a system according to which conveyance of land is no longer effected by mere delivery, traditio, the place of which is supplied or which is itself supplemented by writings such as deeds or notarial instruments, particularly if in addition to these there is a public registration of such documents. Accordingly the Supreme Court in Ceylon has held and apparently in conformity with earlier authority that what took place in this case is equivalent to traditio. The Chief Justice in his judgment thus expresses himself: "....Traditio, whether actual or symbolic, is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed (see *Appuhamy* v. *Appuhamy* (1), where the whole subject is lucidly explained). The same protection, therefore, which the Roman law gave to a person who had completed his title by possession, our own law will give to a person who has completed his title by securing the delivery of a deed."

Perhaps the matter may be put in this way. A sale made by a vendor without title cannot be relied upon as against a purchaser from that vendor after he has acquired title, if and so long as the earlier sale remains in contract only; but if the earlier sale is accompanied, followed or evidenced by certain acts which may be deemed equivalent to the Roman traditio, that sale will prevail.

The deed of 1895 was attested by witnesses and a notary so as to satisfy the conditions required by the Ceylon

(1) 3 Sup. Ct. Circ. 61.

Ordinance for effectual transfer of land, and it was registered as another Ceylon Ordinance directs. In *Rajapakse* v. *Fernando* (1) their Lordships laid stress upon the fact that the conveyance on which reliance was placed had been duly registered, though it should be added that in that case the successful party was in possession.

Their Lordships think that the view of the Chief Justice, in which the other learned judges concurred, was right, at any rate, as applied to the circumstances of the present case. The learned Chief Justice reserved his opinion as to what might be the case if the other party was, as he expressed it, "a bona fide purchaser for value without notice." As he truly said, the defendant was a donee and not a purchaser, and he unquestionably had notice in 1913 of the transaction in 1895. Whether the idea expressed in the words "a bona fide purchaser for value without notice" is one which is exactly appropriate to the system of Roman-Dutch law may be a question. Whether the point can ever arise as regards land where the previous transfer has been duly registered may also be a question. Their Lordships make no pronouncement on these points. They are content to say that in the circumstances of this case and as against this defendant there was a sufficiency of material to satisfy the requirements of traditio under the Roman law.

There remains a point much insisted upon by counsel for the defendant as to the effect of the deed of 1895. The material parts of it are as follows: "Whereas our father Swarisge Marthelis alias Marselino Swaris was seised and possessed of several lands money and other movable property and departed this life intestate at Colombo on or about January 24, 1871, leaving him surviving his widow our mother Maria Felsinger otherwise called Sophia Felsinger and three children namely ourselves the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris and our eldest brother Swarisge Palis Swaris otherwise called Punchimahatmaya and from the date of the death of the said Marthelis alias Marselino Swaris our mother the said Maria Felsinger had

(1) [1920] A. C. 892.

J. C.
1921
FERNANDO
v.
GUNATIL-
LAKA.

been in possession of all our shares in the said properties and in the premises in the schedule hereto fully described and enjoying the rents and profits thereof for and on our behalf as our guardian. And whereas we the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris are entitled by right of paternal inheritance and by other rights acquired by certain title deeds (which are not in our possession) among other properties to certain undivided shares in the premises in the schedule hereto fully described. And whereas we have now attained our respective ages of majority and have agreed with Gammaduwawattagey Don Cornelis Appuhamy of Colombo to sell and convey unto him all our undivided shares right title interest claim and demand whatsoever of in and to the said premises in the said schedule hereto fully described for the price or sum of Rs.1000/-. Now Know all men by these presents that we the said Swarisge Stephen Swaris and Swarisge Nicholas Swaris in consideration of the said sum of Rupees 1000/- lawful money of Ceylon well and truly paid to us by the said Gammaduwawattagey Don Cornelis Appuhamy (the receipt whereof we do hereby jointly and each of us doth respectively admit and acknowledge) do hereby give grant sell assign convey transfer set over and assure unto him the said Gammaduwawattagey Don Cornelis Appuhamy his heirs executors administrators and assigns all our said undivided shares right title interest claim and demand whatsoever of in and to the said premises in the said schedule hereto fully described together with all the buildings erections fixtures ditches trees ways rights easements advantages and appurtenances whatsoever to the said premises belonging or appertaining or usually held or enjoyed therewith or reputed to belong or be appurtenant thereto. To have and to hold the said shares right title and interest in and to the said several premises hereby conveyed or intended so to be unto him the said Gammaduwawattagey Don Cornelis Appuhamy his heirs executors administrators and assigns."

The property is fully described in the schedule and is the property mentioned in the fidei commissum. The recitals,

however, are incorrect. The property had not been the father's property; it had been acquired by Maria under a different title. Stephen and Nicholas had no present shares. Maria was not enjoying the rents and profits as their guardian. If it was a case of the English law of estoppel, much might be said about this. But for the Roman-Dutch law the question is what was the property purported to be conveyed; and on all principles of construction the recitals can only be looked at for the purpose of assisting the Court to arrive at the determination of the actual effect of the conveyance. Stephen and Nicholas purported to assign all their undivided shares, right, title, interest, claim and demand whatsoever of in and to the property in the schedule. Had they any right, title or interest at the time? Supposing that they had none, under the Roman-Dutch law their subsequent acquisition would make this transfer effective. Another way of looking at it is that they did not know what interest they had, but purported to assign all that they had got, and they had a contingent interest which ultimately vested and is now vested in possession. This seems sufficient.

It was suggested that if the Courts in Ceylon had taken this view, all the discussion about the exceptio rei judicatae, etc., might have been dispensed with. It would seem that the judges in the Supreme Court considered the case as if Nicholas and Stephen had no title which they could convey in 1895, and also that they thought that Stephen and Nicholas had purported to transfer the whole property; and that they so construed the deed of 1895 cannot be questioned. It would, however, certainly look as if the judges in the Supreme Court had thought that the deed of 1895 was at the time it was made ineffective, thus differing from a conveyance of a contingent remainder under English law, which since the enabling statute would effectually pass all the interest which the grantor possessed and automatically transfer the property to the grantee when the contingency happened and the remainder vested in possession.

That under the Roman-Dutch law a vested interest in remainder can be alienated must be admitted. Both sides

J. C. 1921 FERNANDO v. GUNATILLAKA.

claim title under transfers made during the lifetime of Maria. The Roman law saw no objection in principle to the transfer of things not yet come into existence (Dig. Lib. XVIII., tit. 1, ss. 8 and 34). But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to their Lordships' notice. No doubt the spes which such a remainderman can alienate is a very shadowy one, for if he predeceases the fiduciary his heirs take nothing (Pereira, Laws of Ceylon, 2nd ed., p. 467), and therefore the alienee could take nothing. But there is, at any rate, no indication either that such an alienation is prohibited by the policy of the law, or that an instrument purporting to alienate is so null and void that it cannot be looked at for any purpose.

In the Maltese case of *Gera* v. *Ciantar* (1), where much inquiry was made into the general law relating to fidei commissa, the work of Cardinal de Luca, Lib. X., " De fidei commissis " was relied upon as an authority. Nothing specific on this subject has been found in his book ; but in his summary of the law he has a title De Alienationibus (pp. 564, 565).

The alienations of which he treats are alienations by the gravatus or fiduciary, and his general observations therefore do not touch the point under consideration : but he does recognize (art. 308) the consent of the owner of the contingent interest as sufficient to validate a transfer made by the fiduciary ; and when he allows the fiduciary to alienate his own life interest he expresses it in this way (art. 315) : " Procedunt haec ut dictum est in alienatione, quae fiat de ipsa substantia, seu bonorum proprietate. Secus autem, ubi gravatus, vel fidei commissi possessor alienet solum jus suum, ipsorumque bonorum fructus, seu commoditatem ejus vita durante, cum id non accedente expressa ac speciali prohibitione, non sit in jure prohibitum, cum haec alienationis species non percutiat bonorum substantiam, neque jus vel dominium im emptorem transferat, ita considerandum loco procuratoris in rem propriam fidei commissarii alienantis, cujus vice ac nomine ad propriam utilitatem fructus, ac emolumenta percipere dicitur."

(1) (1887) 12 App. Cas. 557.

It may therefore be that a transfer of a contingent interest is effective to put the transferee "in loco procuratoris." If it is not so, then the worst that can be said of the deed of 1895 is that the purchaser under it took from vendors who had some interest, which, however, was not transferable. But the purchaser is not in a worse case than he would be if they had no interest at all.

Their Lordships therefore think that the plaintiff can avail herself of the title which she gets under the deed of 1895 in preference to the title of the defendant, and that the decree of the Supreme Court was right; and they will humbly recommend His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Freeman & Cooke.*

Solicitors for respondent: *Herbert Smith, Goss, King & Gregory.*

[PRIVY COUNCIL.]

COMMONWEALTH OF AUSTRALIA . . APPELLANT;

AND

HAZELDELL, LIMITED . . . . . RESPONDENTS.

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . INTERVENER.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Crown Lands—Conditional Sale—Minerals—Limestone—Effect of Grant—Public Mining—Crown Lands Alienation Act, 1861 (25 *Vict. No.* 1, *N.S.W.*)—*Crown Lands Act,* 1884 (48 *Vict. No.* 18, *N.S.W.*) —*Mining Act,* 1906 (6 *Edw.* 7, *No.* 49, *N.S.W.*), *s.* 46, *sub-s.* 2.

The Commonwealth having in 1915 acquired from the respondents fifty-six acres of land in New South Wales under the Lands Acquisition Act, 1906 (Com.), contended that the compensation payable should not include any sum in respect of limestone contained in the land. The

---

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW, and LORD PHILLIMORE.

J. C.

1921

COMMONWEALTH OF AUSTRALIA v. HAZELDELL, LD.

land was part of a plot for which the respondents' predecessor in title had applied under the Crown Lands Alienation Act, 1861 (N.S.W.), and prior to 1884 had been declared the conditional purchaser. That Act provided for a grant in fee simple after three years from the sale, reserving any minerals which the land might contain; minerals were not defined in the Act. The Crown Lands Act, 1884 (N.S.W.), repealed the Act of 1861, but preserved rights acquired thereunder. It provided that Crown grants should reserve "all minerals," which it defined so as not to include limestone. In 1886 a grant of the plot was made which recited that the grantee claimed as conditional purchaser under the Act of 1861; the grant reserved "all minerals"; it also made certain reservations provided for by the Act of 1884 but not by that of 1861. The Mining Act, 1906 (N.S.W.), provided by s. 46, sub-s. 2, that if a Crown grant reserved to the Crown "all minerals" the land should be open to public mining under that Act for "all minerals." The Act defined "minerals" as including any substance which might be declared by Proclamation to be a mineral within the meaning of the Act. By a Proclamation made in 1907 limestone was declared so to be:—

Held (1.) that the grant of 1886 should be construed as having been made under the Act of 1884, and that consequently it did not reserve the limestone to the Crown; it was therefore not necessary (as otherwise it would have been) to determine by evidence whether limestone was included in the term "minerals" in the grant; (2.) that the Act of 1906 did not render the limestone open to public mining, (*a*) because that construction was not clear and would give the enactment the effect of alienating public rights without compensation, and (*b*) because if limestone was a mineral under the Act, the respondents as owners of the land had themselves the right under s. 70 to mine for it, and consequently public mining for it was precluded by s. 46, sub-s. 3.

Judgment of the High Court affirmed.

APPEAL by special leave from a judgment of the High Court of Australia (December 5, 1918) affirming a judgment of the Full Court of the Supreme Court of New South Wales (August 21, 1918) which reversed the judgment of Ferguson J. at the trial.

The question for decision in the appeal was as to the right of the respondents to the limestone in fifty-six acres of land at Mount Fairy in New South Wales. The question arose out of the acquisition of the land by the Commonwealth in 1915 under the Lands Acquisition Act, 1906 (Com.). The nature of respondents' title and the provisions of the relevant enactments fully appear from the judgment of the Judicial Committee.

The judgment of the High Court (Griffith C.J. and Rich J., Gavan Duffy dissenting) is reported at 25 C. L. R. 552. The

judgment of the Full Court in New South Wales, which was affirmed by the High Court, is reported at 18 S. R. (N.S.W.) 342.

1921. June 30; July 1. *Sir John Simon K.C.* and *G. Lawrence* for the appellant. The arguments sufficiently appear from the judgment. [Reference was made to *Midland Ry. Co.* v. *Checkley* (1), *North British Ry. Co.* v. *Budhill Coal Co.* (2), *Barnard Oil and Gas Co.* v. *Farquharson* (3), and *Earl Jersey* v. *Neath Guardians* (4) discussed in *In re Todd, Birleston & Co. and North Eastern Ry. Co.* (5)]

Harney K.C. and *H. O. Danckwerts* for the intervening Attorney-General supported the appellants.

Upjohn K.C. and *J. H. Stamp* for the respondents were not called upon.

July 25. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal by special leave from a judgment of the High Court of Australia dismissing an appeal by the present appellants, the Commonwealth of Australia, from a judgment of the Full Court of the Supreme Court of New South Wales which had reversed a judgment of Ferguson J. in their favour.

The question for decision is as to the right of the respondents to the limestone in fifty-six acres of land at Mount Fairy, New South Wales, and arose in the following manner: By a Crown grant dated April 12, 1886, the land had been granted to Thomas Shanahan (the predecessor in title of the respondents) in fee simple, subject to a reservation of all minerals which the land contained. In the month of April, 1915, the appellants, the Commonwealth of Australia, by notice under the Lands Acquisition Act of the Commonwealth (No. 13 of 1906) compulsorily acquired the land for the purpose of obtaining material for use in connection with buildings to be erected for the Commonwealth. The respondents

(1) (1867) L. R. 4 Eq. 19.
(2) [1910] A. C. 116.
(3) [1912] A. C. 864.
(4) (1889) 22 Q. B. D. 555.
(5) [1903] 1 K. B. 603.

J. C. 1921 COMMONWEALTH OF AUSTRALIA v. HAZELDELL, LD.

claimed 100,000*l.* as compensation for the loss of their interest as tenants in fee of the land (which contains a valuable bed of limestone), and the further sum of 600*l.* as damages for severance; but the appellants, who contended that the respondents had no property, or no valuable property, in the limestone, made a statutory offer of 1200*l.* only in satisfaction of the respondents' claim. The offer was refused, and the respondents commenced this action for compensation.

The trial judge, Ferguson J., upheld the appellants' contention and awarded to the respondents the sum of 1200*l.* only, which was agreed to be the value of the land without the limestone. But on appeal the Full Court (Cullen C.J. and Sly and Gordon JJ.) ordered a new trial, and on further appeal their decision was affirmed, though on somewhat different grounds, by the High Court of Australia (Griffith C.J. and Rich J., Gavan Duffy J. dissenting). It is against this decision that the present appeal is brought.

In order to make clear the contentions on both sides it is necessary to refer to the terms of the grant and to certain legislation leading up to and following upon it.

By the Crown Lands Alienation Act, 1861, of New South Wales (25 Vict. No. 1) it was enacted that Crown lands (with an exception for lands in or near towns and villages) should be open for conditional sale by selection as follows: Any person might tender to the Land Agent for the district a written application for the conditional purchase of any such lands, not being less than forty acres nor more than 320 acres, at the price of 20*s.* per acre, and might pay to such Land Agent a deposit of 25 per cent. of the purchase-money, and if no other like application and deposit for the same land should be tendered at the same time, such person was to be declared the conditional purchaser thereof at the price aforesaid. At the expiration of three years from the date of conditional purchase of any such land, or within three months thereafter, the balance of the purchase-money was to be paid and a declaration was to be made as to the improvement of the land and the residence of the purchaser or his alienee upon it; and thereupon a grant of the fee simple,

but with the reservation of any minerals which the land might contain, was to be made to the then rightful owner. This Act contained no definition of "minerals." The limit of 320 acres imposed by the Act was subsequently increased to 640 acres.

On some date not stated, but which was prior to the passing of the statute next referred to, Thomas Shanahan duly applied under the Act of 1861 for the conditional purchase of a plot containing 640 acres, and including the land in question in this action, and paid the deposit, and he was declared the conditional purchaser of such plot.

By the Crown Lands Act, 1884, of New South Wales (48 Vict. No. 18) the Crown Lands Alienation Act, 1861, was repealed and new provisions were made for the purchase of Crown lands by selection; but the repeal section (s. 2) declared that the repeal should not of itself prejudice or affect any proceeding matter or thing lawfully done or commenced or contracted to be done under any repealed enactment, and that notwithstanding such repeal all rights accrued and obligations incurred or imposed under or by virtue of any of the repealed enactments should, subject to any express provision of that Act in relation thereto, remain unaffected by such repeal. The Act also contained the following provisions: "Sect. 5. Crown lands shall not be sold, leased, dedicated, reserved or dealt with except under and subject to the provisions of this Act, and nothing in this Act shall affect the provisions of any Act regulating mining on Crown lands. . . . . Sect. 6. The Governor on behalf of Her Majesty may grant, dedicate, reserve, lease, or make any other disposition of Crown Lands, but only for some estate, interest or purpose authorized by this Act and subject in every case to its provisions. No Crown Grant issued after the commencement of this Act shall be expressed or purport to be in trust for private persons or purposes. Sect. 7. All grants of land issued under the authority of this Act shall contain a reservation of all minerals in such land, and shall contain such other reservations and exceptions as may by the Governor be deemed expedient in the public interest. . . . ."

J. C. 1921 COMMONWEALTH OF AUSTRALIA v. HAZELDELL, LD.

Sect. 4 of the same Act declared that, unless the context necessarily required a different meaning, the expression "minerals" should mean and include coal and certain other minerals therein specified (not including limestone) and any other substance which might from time to time be declared a mineral within the meaning of that Act by proclamation of the Governor published in the Gazette. No proclamation declaring limestone to be a mineral within the meaning of this Act has been published.

Although Shanahan had been declared the conditional purchaser of his plot before the passing of the Act of 1884, the Crown grant of the land to him was made after the passing of that Act and was dated April 12, 1886. By this document, after recitals to the effect that Shanahan claimed to be entitled in respect of a purchase by conditional sale without competition, under the thirteenth section of the Crown Lands Alienation Act of 1861, to the parcel of land thereinafter described, and that the purchase-money had been duly paid and the necessary declarations made, the land was granted to Shanahan, his heirs and assigns, subject to a reservation to the Crown of "all minerals which the said land contains," with power to work them. The grant also reserved to the Crown such parts of the land as might thereafter be required for public ways, canals or railroads, and also all sand, clay, stone, gravel, timber, etc., which might at any time thereafter be required by the Government of the Colony for the construction and repair of public ways, bridges or canals, or for naval purposes or railroads, with the right of taking and removing all such materials. Shanahan's title under this grant subsequently became vested in the respondents.

The Mining Act, 1906, of New South Wales (6 Edw. 7, No. 49) provides (by s. 46, sub-s. 2) that "if the Crown grant of any private land contains, or if not yet issued will when issued contain, a reservation to the Crown of all minerals, the said land shall also be open to public mining under this Part" (i.e. Part IV. of the Act, relating to public mining) "for all minerals." The interpretation section of the same Act (s. 3) declares that, unless the context or subject-matter

otherwise indicates, "minerals" means silver and certain other minerals therein specified (not including limestone) "and any other substance which may from time to time be declared a 'mineral' within the meaning of this Act by proclamation of the Governor published in the Gazette." A proclamation published under this Act and dated August 12, 1907, declared limestone to be a "mineral" within the meaning of the Act.

On the respondents' action for compensation coming on for trial, the respondents tendered evidence to show the value of the limestone under the land compulsorily acquired; but the learned judge rejected that evidence, holding that even if the limestone was not reserved by the grant, it was by virtue of the Mining Act of 1906 open for public mining, and was therefore of no value to the respondents. He accordingly gave judgment for the respondents for 1200*l.* only. On appeal the Full Court held that the Act of 1906 had no application to minerals not reserved by a grant, and that the question to be decided was whether the word "minerals" in the reservation contained in the Crown grant to Shanahan did or did not include limestone. They further held that, having regard to a series of authorities (of which the latest is *Barnard Oil and Gas Co.* v. *Farquharson* (1)), this question was a question of fact to be determined on a consideration of the date of the grant and the circumstances then existing, and ordered a new trial in order that evidence on these points might be adduced. The Full Court was of opinion that, as Shanahan had become a conditional purchaser under the Act of 1861, the Act of 1884 had no application to the grant. On further appeal to the High Court of Australia, the majority of that Court, while agreeing with the Full Court as to the effect of the Mining Act of 1906, held that the grant to Shanahan, having been made after the passing of the Act of 1884, must be construed with reference to that statute, and that, having regard to the definition of minerals contained in that Act, the limestone was not reserved, but passed to the grantee. They therefore dismissed the appeal and confirmed

(1) [1912] A. C. 864.

J. C. 1921 COMMONWEALTH OF AUSTRALIA v. HAZELDELL, LD.

the order for a new trial; but it is obvious that, having regard to the reasons given by the High Court for their judgment, it would be assumed on the new trial that the limestone belonged to the respondents and the only question would be as to the value of the land with the limestone. It is against this decision that the appellants have appealed to His Majesty in Council.

Having regard to the above statement, it will appear that the questions to be determined on this appeal are two in number—namely, (1.) whether the reservation of minerals in the grant of 1886 had the effect of reserving the limestone, and (2.) if not, whether the effect of the Mining Act of 1906 of New South Wales and the Proclamation issued thereunder was to render the limestone open to mining by the public and of no value to the grantee.

If the first question fell to be decided on the terms of the grant alone and without reference to the Act of 1884, it is plain that there must be a new trial in order to ascertain whether having regard to the facts and circumstances existing at the date of the grant and the meaning then given to the word "minerals," the reservation of minerals included the limestone. This is the effect of a number of decisions of the House of Lords and this Board, including *Lord Provost of Glasgow* v. *Farie* (1), *North British Ry. Co.* v. *Budhill Coal Co.* (2), *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.* (3), *Symington* v. *Caledonian Ry. Co.* (4), and *Barnard Oil and Gas Co.* v. *Farquharson.* (5) But if the grant is to be treated as issued under the Act of 1884, no such question can arise; for that Act provided that all grants of land issued under the authority of the Act should contain a reservation of all minerals in such land, and the expression "minerals" was defined in terms which excluded limestone. In their Lordships' opinion the grant should be treated as issued under that Act. Sect. 5 of the Act of 1884 provided expressly that Crown lands should not be dealt with except under and subject to the provisions of

(1) (1888) 13 App. Cas. 657.
(2) [1910] A. C. 116.
(3) [1911] A. C. 290.
(4) [1912] A. C. 87.
(5) [1912] A. C. 869.

that Act; and s. 6 provided that Crown land might be granted, but only for some estate, interest or purpose authorized by that Act and subject in every case to its provisions. Further, the grant to Shanahan, although not in terms referring to the Act of 1884, contains provisions which indicate that it was intended to take effect under that Act. The grant contained, in addition to the reservation of minerals, a reservation of such land as might thereafter be required for public ways, canals and railroads, and also a reservation of all sand, clay, stone, gravel, timber, etc., which might be required by the Government for the public purposes therein described; and these reservations, while proper to be made under s. 7 of the Act of 1884, find no justification in the earlier Act. If indeed it were proposed to grant to a conditional purchaser under the Act of 1861 something less than he was entitled to under that Act, a question might arise whether, having regard to the saving for existing rights contained in s. 2 of the Act of 1884 his contractual rights could be so cut down against his will; but any such question would be properly raised by the grantee at the time of the grant, and not by the grantor many years after its completion. And it would be inequitable, while leaving the grantee bound by reservations as to public ways, etc., which could only have been made under the later Act, to extend the reservation of minerals by reference to the earlier statute. In their Lordships' opinion, therefore, the reservation of minerals, having been made under the Act of 1884, must be construed in accordance with the definition of "minerals" contained in that Act, and accordingly does not include the limestone.

It may be added that the terms of the grant show that there was no intention of reserving the limestone, for if the whole bed of limestone had been reserved, there would have been no need to reserve the right to take stone for certain limited public purposes. To this it was answered that, as the Act of 1861 required all minerals to be reserved, the limestone (if a mineral) could not legally be granted away, and no intention to grant it could have effect; but, if the grant is construed as operating under the Act of 1884, no

J. C.
1921
COMMONWEALTH OF AUSTRALIA v. HAZELDELL, LD.

such objection arises, and effect can be given to the manifest intention of the parties to the deed.

There remains the question whether the effect of the New South Wales Mining Act of 1906 was to render the limestone, though not reserved under the grant, open to public mining; and on this question also their Lordships are in agreement with the decision of the High Court. If the Act were construed as throwing open to public mining minerals granted by the Crown to private purchasers, the effect of it would be to alienate private rights without compensation; and it has been repeatedly held, as by this Board in *Commissioners of Public Works* (*Cape Colony*) v. *Logan* (1), that such an intention should not be imputed to the Legislature unless expressed in clear terms. No such clear intention appears in the Act of 1906. Sect. 46, sub-s. 2, of that Act provides that, if the Crown grant of any private land contains a reservation to the Crown "of all minerals," the land shall be open to mining under the Act "for all minerals"; and it cannot be that the expression "all minerals" twice used in this short sentence means one thing in the hypothesis and another thing in the conclusion. Either the word "minerals" must in each case be construed in accordance with the definition in the Act, in which case the reservation in the grant of 1886 did not comply with the condition, or—and this appears to be the better view—the expression "all minerals" where secondly used means "all minerals so reserved." In either case the provision has no application to the limestone, which was not reserved by the grant.

The same result may be reached in another way. Sect. 70 of the Act of 1906 declares that the owner of any private land may mine therein for any mineral not reserved to the Crown, and the expression "mineral" here used would under the Proclamation of 1907 include limestone. Sect. 46, sub-s. 3, provides that no application for an authority to enter and mine shall be granted to a member of the public in respect of any land in or upon which any person other than the applicant is at the time of the application entitled to search or prospect

(1) [1903] A. C. 355.

for any mineral. From these provisions taken together, it follows that the grantee under the deed of 1886 is entitled to get the limestone as not reserved, and that no authority to get it can be granted under the Act to a member of the public. Ferguson J. met this argument by pointing out that s. 70 was not in the original Act from which s. 46 was taken; but both sections are contained in the Act of 1906, which must have effect accordingly.

For the above reasons it appears to their Lordships that the Act of 1906 has no application to the limestone in question; and this being so it is unnecessary to consider whether, if it did so apply, the respondents would nevertheless be entitled to some compensation as owners of the limestone subject to the contingency of a licence being granted to a member of the public.

Their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed, and that the appellant should pay the respondents' costs of the appeal including those caused by the intervention. The Attorney-General for New South Wales, who intervened and supported the appellant's contention, will bear his own costs.

Solicitors for appellant: *Coward & Hawksley, Sons & Chance.*

Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for intervener: *Light & Fulton.*

[PRIVY COUNCIL.]

J. C.* 1921 Aug. 1.

CORPORATION OF THE CITY OF VICTORIA . . . . . } APPELLANT;

AND

BISHOP OF VANCOUVER ISLAND . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, BRITISH COLUMBIA.

Canada (British Columbia)—Municipal Taxation—Exemption from Taxation—"Building"—Land upon which Building erected—Ultra vires Taxation—Failure to object to Assessment Roll—Municipal Act (Stat. of B. C., 1914), c. 52, s. 197, sub-s. 1; ss. 216, 230; ss. 141, 241, 478.

Sect. 197, sub-s. 1, of the Municipal Act (British Columbia), exempts from municipal rates and taxes "every building set apart and in use for the public worship of God."

The above exemption applies to the land upon which a building of the description mentioned is erected as well as to the fabric itself. An assessment upon land within the exemption being ultra vires, it can be set aside, although it has been made in a series of years without an objection being taken to the assessment roll under ss. 216 and 230 of the above-mentioned Act; nor does an assessment made upon land which is exempt become binding by reason of ss. 141, 241, or 478 of the Act.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of British Columbia (September 15, 1920) reversing the judgment of Macdonald J.

The main question in the appeal was whether by s. 197, sub-s. 1, of the Municipal Act (Stat. of British Columbia, 1914, c. 52), the land upon which St. Andrew's Cathedral, in the City of Victoria (B.C.) stands, was exempt from municipal rates and taxes as well as the building itself. There was a subsidiary question—namely, whether rates and taxes assessed on the land were payable in the events which had happened even if the land was within the statutory exemption.

The trial judge (Macdonald J.) held that the exemption

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW, and LORD PHILLIMORE.

did not apply, but that decision was reversed on appeal to the Court of Appeal.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

1921. July 1, 4. *H. B. Robertson K.C.* for the appellant Corporation.

Sir John Simon K.C. and *McDiarmid* for the respondent.

The arguments appear fully from the judgment. The appellants' counsel referred (in reference to s. 141 of the Act) to *Wilson* v. *Delta Corporation*. (1)

Aug. 1. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from the judgment of the Court of Appeal of British Columbia, dated September 15, 1920, allowing an appeal from the judgment, dated November 28, 1919, of the trial judge, Macdonald J., by which latter judgment the respondent's action was dismissed and the appellants given judgment on their counterclaim.

The action out of which the appeal has arisen was brought by the Bishop of Vancouver Island, who by the Statute of British Columbia, 1892, c. 56, is created a corporation sole, against the Corporation of the City of Victoria, claiming in the first place, a declaration that no rates or taxes had been lawfully imposed upon certain lands, belonging to him by virtue of his office, upon which lands there had been at all material times erected a building known as St. Andrew's Cathedral dedicated and set apart and in constant use for the public worship of God, and in the second place, an injunction restraining the defendants and their collector of taxes from offering for sale for taxes the aforesaid lands upon which the said cathedral had been erected or any part thereof on May 26, 1919, or any other date, and thirdly general relief.

To this statement of claim the defendants filed a defence setting forth the provisions of many statutes, which they alleged conferred upon them the power, under the conditions above mentioned, to tax the aforesaid lands upon which the

(1) [1913] A. C. 181.

J. C. 1921 VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

said cathedral stands in the City of Victoria, also other provisions which it was alleged barred the plaintiff's right to obtain the relief claimed, and averring that there was due in respect of these lands for general rates and taxes and also for local improvement rates and taxes, together a sum of $15,934.44, for which they counterclaimed. To this defence the plaintiff filed a reply, and to the defendants' counterclaim a defence; to which latter again the defendants filed a reply.

Notwithstanding the voluminous character of these pleadings two questions alone emerge for decision on this appeal. The first and main question is whether by the provisions of s. 197 of the Municipal Act, c. 52, of the Statutes of British Columbia, 1914 (hereafter referred to as the Act of 1914), the land upon which the fabric of St. Andrew's Cathedral stands is exempted from liability for all rates and taxes as completely as the fabric itself is admitted to be. The second and subsidiary question is whether, even if the said lands are not by these provisions so exempted, yet in the events which have happened the general and local rates and taxes in fact assessed upon the said lands for the years 1914 to 1918 both inclusive, amounting to the aforesaid sum of $15,934.44, are due and recoverable by the Corporation under their counterclaim. This latter question though raised in the pleadings is not alluded to in the judgment delivered by the learned judges who decided the appeal; but counsel assure their Lordships it was argued and, of course, they accept that assurance.

Sect. 197 of the Act of 1914 upon which the main question turns, is headed "Taxes on Land or Improvements" and runs as follows: "197. Rates and taxes may be settled, imposed, and levied upon land or upon real property or upon improvements within a municipality by the Council thereof, subject to the following exemptions, that is to say: (1) Every building set apart and in use for the public worship of God: (2) Every burying-ground in actual use solely as such, and every cemetery: (3) Every building set apart and in use solely as a hospital in which the sick, injured, infirm or aged

are received, treated, or maintained, and the land adjoining thereto and actually used therewith, not, however, exceeding 20 acres in case of a public hospital and three acres in case of a private hospital: (4) All property vested in or held by His Majesty, or vested in any public body or body corporate, officer or person, in trust for His Majesty, or for the public uses of the Province, and also all property vested in or held by His Majesty, or any other person or body corporate, in trust for or for the use of any tribe or body of Indians, and either unoccupied or occupied by some person in an official capacity: (*a*) Where any property mentioned in the last preceding clause is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable: (5) All land and improvements the property of the municipality: (6) The buildings of every institution which has for its object the care and charge of orphan and destitute children, and the lands actually used for the purposes of and surrounding the same, not to exceed five acres: (7) The buildings of every horticultural or agricultural society which is affiliated with the Farmers' Institute and in which there are neither shareholders or stockholders, and the lands actually used for the purpose of and surrounding the same, not exceeding five acres." (R. S. 1911, c. 170, s. 228; 1912, c. 25, s. 34.)

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey* v. *Pearson* (1) Lord Wensleydale said: "I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or

(1) (1857) 6 H. L. C. 61, 106.

J. C. 1921 VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Lord Blackburn quoted this passage with approval in *Caledonian Ry. Co.* v. *North British Ry. Co.* (1), as did also Jessel M.R. in *Ex parte Walton.* (2)

There is another principle in the construction of statutes specially applicable to this section. It is thus stated by Lord Esher in *Reg.* v. *Judge of the City of London Court* (3): "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this:—if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation." And Lord Halsbury in *Cooke* v. *Charles A. Vogeler Co.* (4) said: "But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said." Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of any provision of a statute.

Again a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members.

Taking then s. 197 by itself and considering it apart from all other sections, one has to ask oneself what ideas its language, taken in its ordinary grammatical sense, conveys to the mind of one who reads it. Mr. Robertson, in his forcible argument on behalf of the appellants, insisted much upon the fact that under the system of taxation set up by this Act of 1914, and earlier statutes, "land" and "improvements" in the sense defined, which includes buildings, were separately

(1) (1881) 6 App. Cas. 114, 131.
(2) (1881) 17 Ch. D. 746, 751.
(3) [1892] 1 Q. B. 273, 290.
(4) [1901] A. C. 102, 107.

assessed (s. 199), and rates were levied on the land and improvements so assessed (s. 201).

That, no doubt, is so, but that fact affords little help to the true construction of this s. 197, for the obvious reason that several of the subjects of property mentioned in it are admittedly expressly or impliedly put outside the reach of the taxing powers of municipal councils. Of those impliedly so put outside the reach of those powers, graveyards and cemeteries are good examples. Unless the land be in these cases exempted from taxation there is nothing to exempt, nothing upon which the exempting clause can reasonably operate. As to them it becomes simply a collection of idle words without sense or meaning. The question for decision is, are the lands under the buildings set apart and used for the public worship of God dealt with in sub-s. 1 of this section, also impliedly put outside the reach of those taxing powers ?

If one takes the first sub-section of this s. 197 and asks oneself what idea do those words in their ordinary grammatical meaning convey to the mind, the answer must be, a building in which the public worship of God can be carried on. The words " in actual use for " necessarily convey that, and therefore that everything needed to have that worship carried on is comprised in the description of the edifice in which it is to be carried on.

The thing most necessary for the use of the cathedral as a place for public worship is that the congregation which frequents it should be able to stand or kneel upon the ground embraced within its walls and forming the floor of it, or sit upon chairs resting upon that floor. The use of the floor is infinitely more essential than the use of a roof. In fact, it is impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls, as it is impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth. The conception of such things is not the less impossible because the Legislature has by statute made the attempt fancifully to divide for the purpose of taxation concrete entities notionally into sections or portions which

J. C. 1921 VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

are presumably mutually exclusive and independent of each other. Their attempt will be abortive unless the language used be clear and plain. Should it not be so, one must judge by the meaning of the ordinary language used what is the nature of the thing to be dealt with as it is described in that language.

To hold that the ground upon which the cathedral stands is exempt from taxation though not by express words is only to do what to avoid gross absurdity must be done in the case of the buildings mentioned in sub-ss. 3, 6 and 7 of this very s. 197. In the case of a building set apart and solely used as a hospital, the land adjoining thereto and actually used therewith, not exceeding 20 acres in the case of a public hospital and 3 acres in the case of a private hospital, is expressly exempted from taxation, but the ground upon which the hospital stands is not expressly exempted, though it necessarily contributes more to the services of suffering mankind than does the adjoining land. The only rational explanation of that provision is that the latter lands are impliedly exempted, because the word " building," as used in ordinary language, comprises not only the fabric of the building, but the land upon which it stands. The same considerations apply to the case of an orphanage mentioned in sub-s. 6 and to the horticultural societies mentioned in sub-s. 7.

If in these sub-sections the ordinary and natural meaning be given to the word " building," as including fabric and the ground on which it stands, the legislation is rational. If to that word be given the meaning of fabric without the ground upon which it stands the results are absurd. But if, to make sense, this comprehensive meaning be given to the word "building" as used in sub-ss. 3, 6 and 7, it would be contrary to every sound principle of construction to create an antagonism and inconsistency between these sub-sections and the first sub-section by not giving to the word "building" in the first the same comprehensive meaning it bears in the others, especially as the purposes for which the building is to be used go strongly to show that it should get the

comprehensive meaning, and there is no provision to show it should get the restricted one. Taking s. 197 by itself, their Lordships are clearly of opinion that, if rationally and justly construed, the word "building" must receive the same meaning in sub-ss. 1, 3, 6 and 7, that is its natural and ordinary meaning, including the fabric of which it is composed, the ground upon which its walls stand, and the ground embraced within those walls.

It is contended, however, on the part of the appellants that s. 197 of the Act of 1914 cannot be considered by itself, that on the contrary it must be considered in conjunction with the other statutes in pari materia which preceded; and that the provisions of these latter require that the word "building," found in sub-s. 1 of s. 197, should thus receive a meaning different from its ordinary meaning—namely, one including the fabric, but not the ground on which it stands. The particular provisions most relied upon by the appellants on this point are those contained in s. 228 of c. 170 of the Statutes of British Columbia of 1911 (hereinafter referred to as the Act of 1911). This section is in the main identical with s. 197 of the Act of 1914. They differ, however, in two particulars. The former contains no sub-section corresponding with sub-s. 7 of the latter, and in sub-s. 1 of s. 228, the words "or the site thereof" are introduced after the word "building," so that the sub-section runs thus: "Every building or the site thereof set apart and in use for the public worship of God." By an Act c. 47 of the Statutes of British Columbia, 1913 (hereafter referred to as the Act of 1913), this s. 228 is amended by striking out the words, "or the site thereof," thereby restoring the section to what it was in the earlier statute—i.e., s. 157 of c. 29 of the Statute of British Columbia, 1891, and what it continued to be up to the passing of the Act of 1914.

Their Lordships' attention has not been called to anything expressly suggesting the object to effect which these words were introduced into the Act of 1911, and deleted two years later, or what construction was given to the section by the Courts while these words formed part of it. The explanation of their deletion may possibly be that they were considered

J. C. 1921 VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

mere surplusage, and that the true construction of the word "building" by itself was considered to be that for which the respondent the Bishop now contends; or it may conceivably be that the Legislature which added these words discovered, as the fact is, that the word "site" has not one and only one precise and definite meaning—that it might be used to describe a plot of land much larger than that on which a building actually stands, or again might describe the situation or local position of a building. In Webster's New International Dictionary, the word "site" is defined as "the place where anything is or is to be fixed, situation or position, as the site of a City or a Church." In the Imperial Dictionary, it is defined as "situation or local position as the site of a City or a House, and in Architecture the situation of a building, or the plot of ground on which it stands." And in Johnson's Dictionary, "site" is defined as "situation or position." He gives two quotations in which the word occurs to illustrate its meaning. The first from Fairfax:

> "The city's self he strongly fortifies,
> Three sides by site it well defenced has";

and the second from Bacon: "Manifold streams of goodly navigable rivers, as so many chains, environed the same site and temple."

The mystery, however, remains unsolved, why if the Legislature, as the appellants now contend, deleted these words in 1913 for the very purpose of indicating their intention that the ground upon which a building of the kind described in sub-s. 1 of s. 197 of the Act of 1914 stood, should not be exempt from taxation, they did not take the trouble of substituting in 1913 for the words deleted, the words "exclusive of the land upon which the walls of the buildings stand, and also of the lands these walls embrace within them." In this condition of things, it appears to their Lordships impossible to hold that the above-mentioned enactments give any adequate indication of an intention on the part of the Legislature of British Columbia that the word "building" occurring in s. 197, sub-s. 1, of the Act of 1914, should have any meaning other than its ordinary meaning—namely, a

thing composed of the fabric of the building and the ground that the fabric rests upon and encloses.

The second class of provisions upon which the appellants relied in support of their contention as to the meaning of the word "building" as used in sub-s. 1 of s. 197 of the Act of 1914, were the definitions of "land," "real property" and "improvements" respectively contained in s. 2 of the Act of 1914, and the statutes in pari materia preceding it. They contend that by the legislation anterior to the year 1891 every place of worship, with the land requisite for its use, was exempt from taxation, but that the changes introduced in that year, not in legislation ad hoc but in the definitions of "land," "real property" and "improvements" respectively, perpetuated in subsequent statutes, make it clear that by s. 197, sub-s. 1, of the Act of 1914, the buildings mentioned in this later enactment, and not the ground they rest upon, are exempt from taxation. But these definitions, old and new, are as applicable to hospitals, orphanages and agricultural institutions as they are to places of public worship. And therefore, if the contention of the appellants be sound, these definitions must have been designed to bring about or have resulted in bringing about the intense absurdity as to sub-ss. 3, 6 and 7 of this same s. 197, of taxing the land upon which the buildings stand but not taxing the large plots of land adjoining those buildings.

It is not disputed that from the year 1872 till the year 1889, both inclusive, four statutes were passed dealing with this matter of exemption from rates and taxes in each of which the following clauses were to be found: "(4) Every place of public worship, churchyard, burying-ground, public school house, public roadway, square, township or city hall, gaol, hospital, with the land requisite for the due enjoyment thereof; (5) Real estate and improvements, the property of any Fire Department or Company, or of any Mechanics' Institute or public library." It is equally beyond dispute that in the year 1891 an Act entitled an Act to consolidate and amend the Municipal Acts was passed, containing the following definitions: "'Land' shall mean the land itself

J. C. 1921 VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

with all things therein and thereunder, and all trees or underwood growing upon the land, and all mines (other than gold mines), minerals (other than gold), quarries and fossils in and under the land, except mines belonging to Her Majesty. 'Real property' shall mean and include not only the land itself with all things therein and thereunder, and all trees or underwood growing upon the land, and all mines (other than gold mines), minerals (other than gold), quarries and fossils, in and under the land, except mines belonging to Her Majesty, but also all buildings, structures, or other things erected upon or affixed to the land, improvements made to the land, and all machinery or other things affixed to any building on the land, so as to form in law part of the realty. 'Improvements' shall mean all buildings, structures or other things erected upon or affixed to the land, or improvements made to the land, and all machinery or other things affixed to any building on the land so as to form in law part of the realty."

The definitions of "land" and of "real property" respectively are practically repeated in the statute of 1911 and that of 1914. But the definition of "improvements" is somewhat altered in the latter of these Acts, in which it runs thus: "'Improvements,' when used with regard to city municipalities, shall extend to and mean all buildings and structures, and all machinery and fixtures annexed to any building or structure; and when used with regard to town, township or district municipalities shall extend to and mean everything annexed to the soil by the hand of man, such as buildings, structures, fences and all machinery or other things affixed to any building or other structures erected upon or affixed to the soil, or improvements made by clearing, dyking, draining or cultivating the soil; but the erection of buildings and machinery and the construction of skid-roads for temporary use in connection with logging operations or taking lumber off lands (unless a statutory declaration be made that such logging will be forthwith followed by clearance of or settlement upon the land) shall not be deemed improvement for the purpose of this Act." A proviso follows which does not affect the point in controversy in the present case.

"Land" and "real property" bear the same meaning whether situated within city municipalities or without them, but the word "improvements" when used with regard to city municipalities means and includes less than it does when used with reference to town, townships or district municipalities. The main difference between the two consists in this—that in the latter but not in the former the word "improvement" means and includes improvements made by clearing, dyking, draining or cultivating the soil. The difference is presumably due to the fact that farming operations were not carried on to any extent within city municipalities.

"Land" and "real property," which latter includes the soil and everything annexed to it, such as buildings, structures, etc., and improvements of the soil made by clearing, dyking, draining, planting or cultivating it, are equally assessable wherever situated. This is shown by the nine sections of the Act of 1914, numbered from 205 to 213, both inclusive. Their Lordships fail therefore to see how the several definitions above mentioned of the word "improvements" tend in any way to support the contention that the word "building" found in sub-s. 1, s. 197, of the Act of 1914, means only the fabric of the building and not in addition the land upon which the fabric stands.

The next point relied upon by the appellants is that involving the second question urged before their Lordships, but not dealt with in the judgments in the Court of Appeal. It amounts to this, that even assuming that the land on which the cathedral stands is not liable to be taxed, it has, in fact, been taxed to the amount claimed in the counterclaim, and owing to the events which have happened, the respondent is estopped or rendered incapable of contesting his liability for the sum claimed. This contention is based in the first instance upon the provisions of ss. 216 and 230 of the Act of 1914. They provide that every person complaining of an "error or omission in regard to himself" as having been wrongfully placed upon the assessment roll for general taxes shall have a right of appeal to a Court of Revision, and that the assessment roll as revised confirmed and passed by the

J. C.
1921
VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

Court of Revision except as so far as amended on appeal by one of the tribunals mentioned shall be deemed valid and binding on all persons concerned, notwithstanding any defect or error committed in or with regard to such roll or any defect, error or mis-statement in the notice required or transcript of such notice.

It was admitted that the Bishop took no objection to the assessment rolls for the years 1914 to 1917, both inclusive, and that the said rolls were passed and confirmed by the Revision Court, no appeal having been taken; and it was resolutely contended on behalf of the appellants that these assessment rolls become under these circumstances valid and binding on the respondent, and that he could not now be permitted to impeach their accuracy. The same considerations apply to each of these two sections. But these sections are merely machinery sections dealing with irregularities, mistakes and errors occurring in the drawing up, shaping and forming of the assessment rolls, and do not by any means empower the Corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very statutes from 1914 to 1918, both inclusive. To hold that they did so would amount to holding that the Corporation and its officers had the power of repealing express provisions of these statutes.

The whole question comes back to the proper construction of sub-s. 1 of s. 197 of the Act of 1914. If according to the true construction of that section the land upon which the cathedral stands is exempted from taxation, then if the Corporation or its officers attempt through the medium of these machinery sections to assess and tax it, their act is ultra vires and illegal, and the respondent is not disabled from assailing it despite the terms of their assessment rolls. In their Lordships' view these sections in no way disentitled the respondent from insisting on the contention that the ground on which the cathedral stands is exempted from general taxation.

As regards taxation in respect of local improvements, much reliance was placed by the appellants on certain statutory

enactments. It was contended that the assessment made under by-law No. 1946 is valid and binding on the respondent, by reason of the provision contained in ss. 141, 241 and 478 of c. 52 of the Statute of British Columbia, 1914. The first of the sections provides that when debentures have been issued by a municipal council under a by-law which has not been quashed, and interest has been paid on these debentures for one year by the municipality, the by-law and debentures issued thereunder shall be binding on the municipality and the ratepayers, and on all parties concerned. That does not mean that a ratepayer having lands that are exempted shall be bound by this by-law, but that ratepayers in the charged area, shall, as a body—i.e., collectively—be liable to be made answerable for the debenture debt and the interest. The second of these sections provides that any municipal council or any municipality may from time to time make, alter or repeal by-laws, naming and appointing a day upon or before which any person who pays the annual tax assessed, levied on land, real property, or improvements shall be entitled to the deductions named. This section is obviously entirely irrelevant. The third of these three sections—namely, s. 478—provides that "the production of a certificate issued under this part of the Act, or of the certified copy of a certificate shall in all Courts and places, and for all purposes whatever be conclusive evidence that the by-law, debenture, stock or treasury certificate, described in the certificate has been lawfully and validly made and issued, and that all statutory requirements have been complied with, and the validity of such by-law, debenture, stock, or treasury certificate shall not be attacked or questioned or adjudicated upon in any action, suit, or proceeding whatsoever in any Courts of the Province." This only means that the production of the certificate conclusively proves that all proper and necessary steps have been taken to make valid by-laws, and that the debentures have been validly issued, and all the statutory and other requirements complied with, but the section does not help in any way to determine what is the true meaning of the word "building," as used in sub-s. 1 of s. 197 of this Act of 1914,

J. C.
1921
VICTORIA CITY v. BISHOP OF VANCOUVER ISLAND.

still less does it amount to an enactment to the effect that the council can by passing any particular bye-law, or issuing any set of debentures, in the result tax any subject of property which is exempted from taxation by s. 197 of this very Act of 1914. It does not make legitimate that which is ultra vires.

Their Lordships are clearly of opinion that there is nothing in the several statutory enactments hereinbefore mentioned, and so much relied upon by the appellants to indicate much less require that the word "building" occurring in sub-s. 1, s. 197, of the Act of 1914, should be construed as meaning something different from its ordinary meaning as used in popular language—namely, as including not only the actual fabric of the building, but in addition the soil upon which it stands. They think this latter is its true meaning, and therefore that the land upon which the cathedral stands is exempt from taxation. As to the main point contended for as well as the second point the appeal fails.

There only remains for consideration the application of s. 484 of this Act of 1914 to the appellants' action. That section only deals with actions brought against a municipality for the unlawful doing of a thing which the municipality might have lawfully done. The Bishop's action is not of that character. It is an action brought to obtain a declaration that the land upon which his cathedral stands is not taxable, and an injunction restraining the Corporation from offering this land for sale in respect of unpaid rates, on May 26, 1919, or any other day.

Their Lordships are therefore of opinion that the judgment appealed against was right, and should be affirmed, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant Corporation : *Linklaters & Paines.*
Solicitors for respondent : *Witham, Roskell, Munster & Wild.*

[PRIVY COUNCIL.]

AMODU TIJANI . . . . . APPELLANT;

AND

THE SECRETARY, SOUTHERN NIGERIA RESPONDENT.

J. C.*
1921
July 11.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA (SOUTHERN PROVINCE).

Nigeria—Lagos—Native Tenure of Land—White Cap Chiefs—Communal Land—Acquisition of Land by Government—Compensation—Public Lands Ordinance, 1903 (*No. 5 of* 1903, *Lagos*).

The radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is the head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes.

Upon the land held by a White Cap Chief being acquired for public purposes under the Public Lands Ordinance, 1903, the compensation is payable on the footing that the chief is transferring the land in full ownership (except so far as it is unoccupied); the compensation is to be distributed among the members of the community of which he is Chief according to the procedure provided by the Ordinance.

Observations with regard to the native tenure of land in West Africa, and as to "stool" lands.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment of the Supreme Court of Nigeria, Southern Province (January 4, 1918), affirming the judgment of Speed C.J.

The appellant was one of the Idejo White Cap Chiefs of Lagos. By a notice dated November 12, 1913, certain lands situated at Apapa were acquired by the Government of the colony under the Public Lands Ordinance (No. 5 of 1903) for public purposes. The appellant as head chief of the Oluwa family claimed compensation on the basis of ownership of the lands. On a summons taken out by the appellant under the Ordinance above named Speed C.J. held that the appellant was entitled to compensation on the basis of his having merely a right of control and management, not on the basis of absolute ownership. That decision was affirmed by

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD PHILLIMORE.

J. C. 1921

AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

the full Court (Speed C.J. and Ross, Webber, and Pennington JJ.)

The material facts appear from the judgment of the Judicial Committee.

Special leave to appeal was granted on June 25, 1918, leave being reserved to the respondent to object at the hearing of the appeal that there was no jurisdiction to grant leave to appeal.

1921. June 6, 7, 9, 21. *Hon. Sir William Finlay K.C.* and *J. A. Johnston* for the appellant.

Upjohn K.C. and *Vernon* for the respondent.

In the course of the argument reference was made to *Attorney-General of Southern Nigeria* v. *Holt*, both in the Supreme Court (1) and on appeal to the Board (2); *Oduntan Onisiwo* v. *Attorney-General of Southern Nigeria* (3); to the following unreported decisions in the colony, *Callamand* v. *Vaughan* (1878), *Ajon* v. *Efunde* (1892), *Ohuntan's Case* (1908), *Taiwo* v. *Odunsi Sarumi* (1913); and to *Secretary of State* v. *Kamachee Boye Sahaba* (4) and *Durga Prashad Singh* v. *Tribeni Singh.* (5) Also to the Public Lands Ordinance (No. 5 of 1903) and to earlier Ordinances—namely, No. 9 of 1863, No. 10 of 1864, No. 9 of 1865, and No. 9 of 1869—and to Historical Notices of Lagos by Rev. J. B. Woods (1880), Report of Land Tenure in West Africa by Rayner C.J. (1898), Notes of Evidence taken by the West African Lands Committee (1912–1914), and Irving's Titles to Lands in Nigeria (1916).

July 11. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case the question raised is as to the basis for calculation of the compensation payable to the appellant, who claims for the taking by the Government of the colony of Southern Nigeria of certain land for public purposes. There was a preliminary point as to whether

(1) (1910) 2 Nig. L. R. 1.
(2) [1915] A. C. 599.
(3) (1912) 2 Nig. L. R. 77.
(4) (1859) 7 Moo. I. A. 476.
(5) (1918) L. R. 45 I. A. 275.

the terms of the Public Lands Ordinance of the colony do not make the decision of its Supreme Court on such a question final. As to this it is sufficient to say that the terms of the Ordinance did not preclude the exercise which has been made of the prerogative of the Crown to give special leave to bring this appeal.

The Public Lands Ordinance of 1903 of the colony provides that the Governor may take any lands required for public purposes for an estate in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the colony. The Governor is to give notice to all the persons interested in the land, or to the persons authorized by the Ordinance to sell and convey it. Where the land required is the property of a native community, the head chief of the community may sell and convey it in fee simple, any native law or custom to the contrary notwithstanding. There is to be no compensation for land unoccupied unless it is proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it. In other cases the Court is to assess the compensation according to the value at the time when the notice was served, inclusive of damage done by severance. Prima facie, the persons in possession, as if owners, are to be deemed entitled. Generally speaking, the Governor may pay the compensation in accordance with the direction of the Court, but where any consideration or compensation is paid to a head chief in respect of any land, the property of a native community, such consideration or compensation is to be distributed by him among the members of the community or applied or used for their benefit in such proportions and manner as the Native Council of the District in which the land is situated, determines with the sanction of the Governor.

The land in question is at Apapa, on the mainland and within the colony. The appellant is the head chief of the Oluwa family or community, and is one of the Idejos or landowning White Cap Chiefs of Lagos and the land is occupied by persons some of whom pay rent or tribute to him.

J. C. 1921 AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

Apart from any family or private land which the chief may possess or may have allotted to members of his own family, he has in a representative or official capacity control by custom over the tracts within his chieftaincy, including, as Speed C.J. points out in his judgment in this case, power of allotment and of exacting a small tribute or rent in acknowledgment of his position as head chief. But when in the present proceedings he claimed for the whole value of the land in question, as being land which he was empowered by the Ordinance to sell, the Chief Justice of the Supreme Court held that, although he had a right which must be recognized and paid for, this right was: "merely a seigneurial right giving the holder the ordinary rights of control and management of the land in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis, and not on the basis of absolute ownership of the land." It does not appear clearly from the judgment of the Chief Justice whether he thought that the members of the community had any independent right to compensation, or whether the Crown was entitled to appropriate the land without more.

The appellant, on the other hand, contended that, although his claim was, as appears from the statement of his advocate, restricted to one in a representative capacity, it extended to the full value of the family property and community land vested in him as chief, for the latter of which he claimed to be entitled to be dealt with under the terms of the Ordinance in the capacity of representing his community and its full title of occupation.

The question which their Lordships have to decide is which of these views is the true one. In order to answer the question, it is necessary to consider, in the first place, the real character of the native title to the land.

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution

is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. (1) But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community

(1) See 14 App. Cas. 46 and [1920] 1 A. C. 401.

J. C. 1921

AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

In the case of Lagos and the territory round it, the necessity of adopting this method of inquiry is evident. As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.

In the instance of Lagos the character of the tenure of the land among the native communities is described by Rayner C.J. in the Report on Land Tenure in West Africa, which that learned judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority: "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or

family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognized, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land."

Consideration of the various documents, records and decisions, which have been brought before them in the course of the argument at the Bar, has led their Lordships to the conclusion that the view expressed by Rayner C.J. in the language just cited is substantially the true one. They therefore interpret para. 6 of the Public Lands Ordinance of 1903, which says that where lands required for public purposes are the property of a native community, "the Head Chief of such community may sell and convey the same for an estate in fee simple," as meaning that the chief may transfer the title of the community. It follows that it is for the whole of what he so transfers that compensation has to be made. This is borne out by paras. 25 and 26, which provide for distribution of such compensation under the direction of the Native Council of the District, with the sanction of the Governor.

The history of the relations of the chiefs to the British Crown in Lagos and the vicinity bears out this conclusion.

J. C. 1921 — AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

About the beginning of the eighteenth century the Island of Lagos was held by a chief called Olofin. He had parcelled out the island and part of the adjoining mainland among some sixteen subordinate chiefs, called "Whitecap" in recognition of their dominion over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative as ruler whose title was the "Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but little with the customs and arrangements in the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period Lagos had become a centre of the slave trade, and this trade centre the British Government determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo. In 1861 he made a treaty of cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British Government, with the title "Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate colony, and finally, in 1906, it became part of the colony of Southern Nigeria.

In 1862 a debate took place in the House of Commons which is instructive as showing the interpretation by the British Government of the footing on which it had really entered. The slave trade was to be suppressed, but Docemo was not to be maltreated. He was to have a revenue settled on and secured to him. The real possessors of the land were considered to be, not the native kings, but the White Cap Chiefs. The apprehension of these chiefs that they were to be turned out had been set at rest, so it was stated. The object was to suppress the slave trade, and to introduce

orderly conditions. Such, in substance, was the announcement of policy to the House of Commons by the Under Secretary for Foreign Affairs, and the contemporary despatches and records confirm it and point to its having been carried out. The chiefs were stated, in a despatch from the then Consul, to have been satisfied that the cession would render their private property more valuable to them. No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. What has been stated appears to have been the view taken by the Judicial Committee in a recent case, *Attorney-General of Southern Nigeria* v. *Holt* (1), and their Lordships agree with that view. Where the cession passed any proprietary rights they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo* v. *Attorney-General of Southern Nigeria* (2), decided by the Supreme Court of the colony in 1912, Osborne C.J. laid down as regards the effect of the cession of 1861, that he was of opinion that "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown

(1) [1915] A. C. 599.

(2) 2 Nig. L. R. 77.

J. C. 1921 AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

Their Lordships now turn to the judgments of Speed C.J. in the two Courts below. The reasons given in these judgments were in effect adopted by the full Court, and they are conveniently stated in what was said by the Chief Justice himself, in the Court of first instance. He defined the question raised to be "whether the Oluwa has any rights over or title to the land in question for which compensation is payable, and if so upon what basis such compensation should be fixed." His answer was that the only right or title of the chief was a "seigneurial right giving the holder the ordinary rights of control and management of the land, in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis and not on the basis of absolute ownership." The reasons given by Speed C.J. for coming to this conclusion were as follows: According to the Benin law the King is the sovereign owner of the land, and as the territory was conquered by the Benins it follows that during the conquest the King of Benin was the

real owner, the control exercised by the chiefs under his "Eleko" or representative being exercised as part of the machinery of government and not in virtue of ownership. It might be that for a considerable period prior to 1850 the control of the King of Benin had been relaxed until it became little more than a formal and nominal overlordship, and that in this period there had been a tendency on the part of the minor chiefs to arrogate to themselves powers to which constitutionally they had no claim, including independent powers of control and management. But the effect of the cession of 1861 was that, even according to the then strict native law, all the rights over the land, including sovereign ownership, passed to the British Crown. He finds that what was recognized by the British Government was simply the title of the chiefs to exercise a kind of control over considerable tracts of land, including the right to allot such lands to members of their family and others for the purposes of cultivation, and to receive a nominal rent or tribute as an acknowledgment of "seigneurial" right. Strict native law would not have supported this claim, but it was made and acquiesced in, although there were certain Crown grants which appear to have ignored it. There was thus no title to absolute ownership in the chiefs, and, so far as the judgment in the *Onisiwo Case* (already referred to), was inconsistent with this view, it was based on a confusion between family and chieftaincy property. It was true that in yet another case in 1907, which came before the full Court, the Government had paid compensation on the basis of absolute ownership, but in that case the Government had not raised the question of title, and the decision consequently could not be regarded as authoritative.

Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary

J. C. 1921 AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the full Court.

Nor do their Lordships think that there has been made out any distinction between "stool" and communal lands, which affects the principle to be applied in estimating the basis on which compensation must be made. The Crown is under no obligation to pay any one for unoccupied lands as defined. It will have to pay the chief for family lands to which he is individually entitled when taken. There may be other portions of the land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments, he will have to be compensated for the loss of it, and if the allottees have had valid titles conferred on them, they must also be compensated. Their Lordships doubt whether any really definite distinction is connoted by the expression "stool lands." It probably means little more than lands which the chief holds in his representative or constitutional capacity, as distinguished from land which he and his own family hold individually. But in any event the point makes little difference for practical purposes. In the case of land belonging to the community, but as to which no rent or tribute is payable to the chief, it does not appear that the latter is entitled to be

compensated otherwise than in his representative capacity under the Ordinance of 1903. It is the members of his community who are in usufructuary occupation or in an equivalent position on whose behalf he is making the claim. The whole matter will have to be the subject of a proper inquiry directed to ascertaining whose the real interests are and what their values are.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Courts below should be reversed, and that declarations should be made : (1.) That the appellant, for the purposes of the Public Lands Ordinance No. 5 of 1903 is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting in so far as such land is unoccupied, along with his own title to receive rent or tribute ; (2.) That the consideration or compensation awarded is to be distributed, under the direction of the Native Council of the District with the sanction of the Governor, among the members of the community represented by the appellant as its head chief in such proportions and in such manner as such Council, with the sanction of the Governor, may determine. The case will go back to the Supreme Court of Nigeria (Southern Provinces) to secure that effect is given to these declarations. The appellant is entitled to his costs of this appeal and of the appeal to the full Court, and in any event to such costs of the original hearing as have been occasioned by the question raised by the respondent as to his title. The other costs will be dealt with by the Supreme Court in accordance with the provisions of the Ordinance.

Solicitor for appellant : *E. F. Hunt.*
Solicitors for respondent : *Burchells.*

[PRIVY COUNCIL.]

J. C.* 1921 July 21.

BAIN . . . . . APPELLANT;

AND

CENTRAL VERMONT RAILWAY COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Negligence—Master and Servant—Railway Companies—Jointly operated Line—Liability of Companies—Control of Servant—Disregard of Signals.

The appellant's husband was killed owing to the negligence of the respondent company's engine driver in disregarding the signals of another company upon whose line he was driving the engine under an agreement between the companies for joint working; each company paid the drivers employed in the joint service for the service on its own line. The appellant sued the respondents for damages:—

Held, that the respondent company was not liable, since at the moment of the accident the engine driver was under the control of the other company.

Donovan v. *Laing Syndicate* [1893] 1 Q. B. 629 approved.

Judgment of the Supreme Court affirmed.

APPEAL by special leave from a judgment of the Supreme Court (April 9, 1919) reversing a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (June 21, 1918) which affirmed the judgment of Mercier J. at the trial.

The action was brought by the appellant against the respondent company under the circumstances stated in the judgment of the Judicial Committee. The judgment of the Supreme Court is reported at 57 Can. S. C. R. 433.

1921. July 5. *Rinfret K.C.* and *Ogden K.C.* for the appellant. The respondent company was liable for the negligence of its engine driver. The agreement did not have the effect of removing the engine from the control of the driver; there was a measure of control over the engine driver in the respondent company. The running of the engine was for the joint benefit of the two companies.

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW.

The respondents were liable either exclusively or jointly. [Reference was made to *Gill* v. *Manchester Ry. Co.* (1), *Moore* v. *Palmer* (2), *Dewar* v. *Tasker & Sons* (3) and s. 238 of Railway Act of Canada (51 Vict. c. 29).]

Newcombe K.C. and *G. Lawrence* for the respondents were not called upon.

1921. July 21. The judgment of their Lordships was delivered by

LORD DUNEDIN. Hedges, a locomotive fireman in the employment of the Grand Trunk Railway Company, was killed in the course of his duties at Montreal on February 2, 1915, by being run into by another engine driven by an engineer called Frost. It is admitted that Frost was guilty of negligence. Frost was in the service of the Central Vermont Railway Company. The widow of Hedges, for herself and an infant daughter, received compensation from the Grand Trunk Railway Company under the Workmen's Compensation Act for the death of her husband. This disentitled her to raise any action against the Grand Trunk, but in terms of art. 7334 of the Civil Code of Quebec she was entitled to recover against any person other than the employers against whom she had a right of action. She accordingly raised action against the Central Vermont Railway Company. That company is an American railway company, but owns a line in Canada extending from the boundary to St. Johns in the province of Quebec. The Grand Trunk have a line from Montreal to St. Johns. The two companies entered into an agreement for the joint working of the line from Montreal via St. Johns to St. Albans in Vermont.

It is unnecessary to set forth the agreement in full; the relevant clauses are as follows: "Whereas, it is considered desirable and to the mutual advantage of both parties hereto to operate jointly, and as one line, the railway from Montreal to St. Albans, for both freight and passenger business. . . . .

(1) (1873) L. R. 8 Q. B. 186. (2) (1886) 2 Times L. R. 781.
(3) (1907) 23 Times L. R. 259.

J. C. 1921 BAIN v. CENTRAL VERMONT RAILWAY CO.

That each party may furnish its mileage proportion of passenger and freight engines (the engines of both Companies to be as nearly as possible of equal capacity), cabooses and train crews thereof used in joint service between Montreal, Canada and St. Albans, Vermont. . . . . That each party hereto shall pay the train and engine men employed in the joint service for the service performed by them on its own line, and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party hereto."

As Frost, at the time of the accident, was driving a train on the Grand Trunk line and as his negligence consisted in his failing to attend to Grand Trunk signals, the Central Vermont Company denied liability on the ground that Frost, at the time of the accident, was in the employment of and subject to the orders of the Grand Trunk.

The learned trial judge found for the plaintiff. He thought that as Frost was engaged by the Central Vermont Company he was their servant, and that in a question with the plaintiff the agreement between the companies was res inter alios acta. This was manifestly a bad ground of judgment. The agreement between the companies would indeed be res inter alios acta in so far as it covenanted as to liability inter se, but in so far as it determined the position of the servants who performed their functions on the joint line it was obviously admissible as the best evidence. On appeal to the Court of King's Bench, that Court, by a majority, one judge dissenting, affirmed the decision of the trial judge, but on a different ground. On appeal to the Supreme Court of Canada that Court unanimously agreed with the dissenting judge and dismissed the action. Appeal has now been taken to His Majesty in Council.

It seems to their Lordships that there was indeed no difference of opinion between any of the judges in the Courts below, with the exception of the trial judge, as to the law to be applied to the case. Indeed it cannot be more concisely or accurately stated than it was by Cross J., who gave the judgment of the majority in the Court of King's Bench when

he says: "He (Frost) was in the general service of the Central Vermont Railroad Company, but it is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously) or sub-contracted. In such a case, it is the 'patron momentané' and not the 'patron habituel' who is responsible," and he quotes inter alia in support the case of *Donovan* v. *Laing Syndicate.* (1)

The same view of the law is repeated in each and all of the admirably clear judgments of the learned judges of the Supreme Court of Canada. The difference of opinion arises, therefore, upon the view taken of the facts. It is true that in general it is well to abide by the view of the facts taken by the tribunal of first instance. But while this is so when any question of credibility is involved, it does not follow when the view of facts rests rather upon inference from facts as to which there is no dispute other than a difference of view as to the facts themselves.

What then was the position of Frost? The question is really admirably expressed by the French phrase. It is common ground that the Central Vermont Company was to Frost the "patron habituel," but which of the two companies was the "patron momentané"? Their Lordships have no hesitation in agreeing with the view unanimously taken by the learned judges of the Supreme Court. The ratio decidendi of the Court below lies in the view that in the words of Cross J., "the Central Vermont Company retained a measure of control of Frost instead of having put him completely under the orders of the other Company." He cites as justifying this view that if Frost had been told by the Central Vermont Company to stop at a certain station on the line he must have done so and that he had a duty to keep clean and preserve his engine the property of the Central Vermont Company. It is from these facts he draws the conclusion

(1) [1893] 1 Q. B. 629.

J. C.
1921
BAIN
v.
CENTRAL VERMONT RAILWAY CO.

that the control of the Central Vermont Company was not excluded. Their Lordships think that this is leaving out of view the point of time at which the position must be determined. In the words of the judgment reported by Sirey and quoted by Brodeur J. you are to look to the "patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive au moment de l'accident." It is nothing to the purpose that there may be at the same time a sort of residuary and dormant control of the "patron habituel." Now what caused the accident? The disregard of the signals. They were Grand Trunk signals. These signals were the mechanical expression of the orders of the Grand Trunk, orders which Frost at that moment was bound to obey. At that moment and for the purpose of regulating the speed of the train Frost was under the orders of the Grand Trunk. As a matter of fact so literally was the arrangement, embodied in clause 6 of the agreement already quoted, carried out that Frost signed a separate receipt for the payments made to him by each company respectively for his services while working on each line respectively. Payment is not everything; it is a circumstance pointing to who is the employer, but the real test is control, and at the moment of the accident the control of Frost was in the Grand Trunk.

Their Lordships had occasion to examine the law on this subject in a very recent case which had not been decided when the Supreme Court gave judgment. It is the case of *La Société Maritime Francaise* v. *Shanghai Dock and Engineering Co.* (1), which is not yet reported. They can only repeat what they there said, that they were of opinion that the law was accurately laid down by Bowen L.J. in *Donovan* v. *Laing Syndicate.* (2) The first sentence of the judgment of Bowen L.J. which was there quoted is as follows: "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act."

This is precisely what was laid down in the case reported

(1) See infra. (2) [1893] 1 Q. B. 629, 633, 634.

by Sirey already quoted, and it expresses precisely the test which the Supreme Court has in this case applied to the facts.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

J. C. 1921 BAIN v. CENTRAL VERMONT RAILWAY CO.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Batten, Proffitt, Scott & Weddell.*

NOTE.

J. C. 1921. Feb. 11. *La Société Maritime Francaise* v. *Shanghai Dock and Engineering Co., Ld.* Appeal from the Supreme Court of China, Shanghai. The appellants sued the respondents for damage to a motor launch caused by a servant of the respondents, whom they placed at the disposal of the appellants to carry out certain repairs to the launch. Their Lordships, applying the test laid down by Lord Bowen in *Donovan* v. *Laing Syndicate* [1893] 1 Q. B. 629, held that the respondents were not liable since their servant was under the control of the appellants when the accident happened. The passage cited from the judgment of Lord Bowen in the present judgment, together with the paragraphs following it, was approved. The judgment appealed from was affirmed.

[PRIVY COUNCIL.]

J. C.* 1921 *July* 22.

CANADIAN PACIFIC WINE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

TULEY AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Legislative Authority—Provincial Legislation—Liquor Prohibition—Criminal Procedure—Trespasser ab initio—British Columbia Prohibition Act (1916, *c.* 49, *etc., B. C.*)—*Summary Convictions Act* (1915, *c.* 59, *B. C.*)—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 103), *s.* 91, *head* 2; *s.* 92, *heads* 15, 16.

The British Columbia Prohibition Act (1916, c. 49, B. C. and amending Acts, consolidated for convenience in 1920) prohibited within the Province the keeping for sale or sale of "liquor" as therein defined,

* *Present:* VISCOUNT BIRKENHEAD L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD CARSON, and SIR LOUIS DAVIES.

J. C.
1921
CANADIAN PACIFIC WINE CO. v. TULEY.

exception being made of liquor kept for export and in certain other cases. Penalties were thereby imposed which were to be recovered or enforced under the Summary Convictions Act (1915, c. 59, B. C.) save so far as the Act itself provided. The Act itself contained sections dealing with procedure, and by ss. 48 and 49 police officers were given a right to search premises without warrant and to seize liquor believed to be intended for sale in violation of the Act. The Summary Convictions Act, 1915, provided procedure for the recovery or enforcement of penalties prescribed by any Act of the Province which did not itself provide the procedure.

The appellants, who were dealers in liquor as importers into and exporters from the Province, had in their warehouse there on July 15, 1920, a large stock of liquor. On a previous date a police officer had gone to the warehouse and purchased liquor, giving in payment marked money. On the date above named the respondent police officers entered the warehouse and seized and removed the whole stock of liquor, together with books and papers and the marked money. A magistrate subsequently convicted the appellants under the Summary Convictions Act, 1915, of an offence under the Prohibition Act, finding that the whole stock of liquor in the warehouse was unlawfully kept there. The appellants sued the respondents claiming replevin and other relief. At the trial the appellants recovered the marked money, as to which there was no appeal. The books and papers were seized under a search warrant issued under the Summary Convictions Act, and had been returned to the appellants:—

Held, (1.) that the two provincial statutes above mentioned were intra vires under the British North America Act, 1867; (2.) that the facts justified the finding of the magistrate; (3.) that the police officers having lawfully entered the appellants' premises did not become trespassers ab initio even if the seizure of the books, papers, and money was unlawful; and (4.) that the appellants were not entitled to any relief other than that which they had obtained at the trial.

Attorney-General of Manitoba v. *Manitoba Licence Holders' Association* [1902] A. C. 73 and *Attorney-General for Ontario* v. *Attorney-General for Dominion* [1896] A. C. 348 followed; also (as to trespass ab initio) *Harvey* v. *Pocock* (1843) 11 M. & W. 740.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of British Columbia (dated April 9, 1921) affirming a judgment of the Supreme Court of that province (Murphy J.).

The appellants sued the respondents in the Supreme Court, claiming the return of its stock of liquor together with certain books, papers and money seized by police officers, who were respondents, and for damages. The action arose out of proceedings taken by the police under the British Columbia Prohibition Act (1916, c. 49, B. C., and amending statutes). (1)

(1) The Act was repealed in 1921 by Act 30 of that year.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The action was tried by Murphy J., who gave judgment for the money in question—namely, 60 dollars, but in other respects dismissed the action. On an appeal to the Court of Appeal by the present appellants the judgment was affirmed.

1921. July 11, 12. *Sir John Simon K.C.*, *Charles Wilson K.C.*, and *C. S. Arnold* for the appellants. The sections of the Prohibition Act which deal with procedure, including ss. 48 and 49, and the Summary Convictions Act, 1915, as a whole, were ultra vires, since they governed procedure in a criminal matter, and consequently dealt with a subject committed exclusively to the Dominion Legislature by the British North America Act, 1867, s. 91, head 27. Though a province can under s. 92, head 14, constitute a Court, and under head 15 provide a punishment for the infraction of provincial laws, the provisions in question went beyond those matters. Part XV. of the Criminal Code of Canada provided the whole of the procedure needed for the enforcement of criminal law. The intention was that there should be one system of criminal procedure throughout Canada. Further, the Prohibition Act by ss. 19, 57 excluded the appellants' warehouse from the operation of the Act, since they were exporters. Under s. 19 it was only such liquor as was removed from the warehouse that was kept in violation of the Act and liable to seizure under s. 49. If s. 19 did not exclude the appellants' warehouse, it was ultra vires under s. 91, head 2, of the Act of 1867, as an attempt to regulate inter-provincial and foreign trade. There was not material upon which the police officers could bona fide come to the conclusion that the whole of the liquor in the warehouse was kept in violation of the Act. [Reference was made to *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1), also to *R. Dahlin*. (2)] If, however, the original entry was lawful the police officers became trespassers ab initio

(1) [1902] A. C. 73. (2) (1919) 27 B. C. Rep. 564.

J. C.
1921
CANADIAN PACIFIC WINE CO. v. TULEY.

when they unlawfully seized the money, paper and books: *Smith* v. *Egginton* (1); *Attack* v. *Bramwell*. (2) The suggestion that no damage resulted was not material: *Martinello & Co.* v. *McCormick*. (3) The subsequent conviction of the appellants did not justify the wrongful seizure: *Caine* v. *Palace Steam Shipping Co.* (4)

S. S. Taylor K.C. for the respondents, and for the Attorney-General of the Province, intervener, was not called upon.

July 21. The judgment of their Lordships was delivered by

VISCOUNT BIRKENHEAD L.C. This is an appeal from a judgment of the Court of Appeal of British Columbia, which affirmed the judgment of the trial judge Murphy J. delivered in the Supreme Court. The action was brought for the return of movable property of the appellants, including books and papers and a stock of liquor, alleged to have been illegally seized, and for damages for such seizure and for unlawful entry into the appellants' warehouse. The respondents, excepting the respondent South, who is a deputy police magistrate, are police officers of the City of Vancouver.

The first question to be decided relates to the constitutional validity of the statutes under which the respondents purported to act. These are the British Columbia Prohibition Act, as consolidated in 1920, and the Summary Convictions Act, 1915.

The former statute provides by s. 10 that, subject to exceptions not here material, no person shall within the Province, by himself, his clerk, servant, or agent, expose or keep for sale, on any pretence or upon any device sell or barter, or offer to sell or barter, or in consideration of the purchase, a transfer of any property or thing, or for any other consideration, or at the time of the transfer of any property or thing, give to any other person, any liquor. By s. 11 the keeping, having, or giving of liquor in any place other than the private dwelling house where a

(1) (1837) 7 Ad. & E. 167, 176.
(2) (1863) 3 B. & S. 520.
(3) (1919) 59 Can. S. C. R. 394.
(4) [1907] 1 K. B. 670; affd. [1907] A. C. 386.

person resides is prohibited. Sect. 19 provides that nothing in the Act shall prevent the keeping of liquor for export, provided that the warehouse in which it is kept complies with certain requirements in default of the observance of which it is not to be deemed to be a warehouse within the Act, or from selling from such warehouse liquor to persons in other provinces, or in foreign countries, or to a vendor under the Act. By an amendment introduced into the Act in 1919 by way of an addition to s. 19, it is provided that any person who has liquor in a warehouse shall furnish the Commissioners under the Act with certain information as to the warehouse and the liquor in it, and as to all removals from it of such liquor, with its destination, and the Commissioner or his agent authorized in writing may enter and make such searches in the warehouse as he thinks necessary for the purpose of obtaining or confirming information. Penalties imposed under the Act are by s. 30 to be recoverable under the provisions of the Summary Convictions Act. By s. 48 the Commissioner, Superintendent or any police officer, are for the purpose of detecting the violation of any of the provisions of the Act to have power, where it is believed that liquor is kept contrary to its provisions, to enter and search, and break open lockfast places, and any one who obstructs such entry is to be guilty of an offence against the provisions of the Act. By s. 49 if the Commissioner, Superintendent, or any police officer believes that liquor intended for sale in violation of the Act is concealed in the vehicles or on the land of any person, he or they are to have power without warrant to search for and seize such liquor and the vessels in which it is kept, and by s. 50 the justice who convicts for the keeping of liquor contrary to the provisions of the Act, may declare the liquor and the vessels to be forfeited. By s. 28 every person contravening or committing any breach of the provisions of s. 10 is made liable to fine or imprisonment, and further, for every offence against the Act for which a penalty has not been specially provided, penalties of fine or imprisonment are enacted.

The above summary represents sufficiently for the purposes

J. C. 1921 CANADIAN PACIFIC WINE CO. v. TULEY.

of the present appeal, the main provisions of the statute. Their Lordships are of opinion that it was within the power of the Legislature of British Columbia to enact it. The case is in their opinion governed by the principles enumerated when their decision was given in favour of the Province of Manitoba on the interpretation of ss. 91 and 92 of the British North America Act, 1867, in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association.* (1)

The second statute under which the proceedings of the police are justified in the present proceedings, and which in turn is impeached, is the Summary Convictions Act of the province. This statute provides (s. 2) that in every case in which a penalty or imprisonment is prescribed by any statute of the Province, and it is not provided in such statute in what manner or by what procedure such penalty or punishment may be recovered or enforced, such penalty or imprisonment shall be enforced on summary conviction before a justice (including a police magistrate) as if the same was expressly so declared in such statute. By s. 4, the Act is to apply to cases in which any person commits or is suspected of having committed any offence or act over which the Legislature has legislative authority, and for which such person is liable on summary conviction to imprisonment, fine, or other punishment; and to cases in which a complaint is made to any justice in relation to any matter over which the Legislature has such authority, and with respect to which the justice has authority by law to make any order for the payment of money or otherwise. The Act further contains provisions for procedure, and for enabling, under s. 11, the justice to detain anything seized and brought before him for the purposes of evidence.

It was contended at the Bar that this statute was ultra vires of the provincial Legislature, on the ground that it was an attempt to enact provincial legislation for "criminal law," including procedure in criminal matters, within the words of s. 91, head 27, of the British North America Act. But that section only declares that it is to be lawful for the

(1) [1902] A. C. 73.

Sovereign, with the advice of the Dominion Parliament, to make laws for the peace, order and good government of Canada generally, in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the Legislatures of the provinces, and the enumeration of matters which follows in s. 91 to which the exclusive authority of the Dominion Parliament extends is only a declaration that certain subjects fall under this description. When the language of s. 92, which defines the matters to which the exclusive legislative authority of the province extends, is scrutinized, this definition is found to include the administration of justice in the provinces embracing the constitution, maintenance and organization of provincial Courts, both civil and criminal, and procedure in civil matters in these Courts. Head 15 of s. 92 expressly adds the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of a province, made in relation to any of the classes of subject enumerated in the section; and head 16 gives exclusive legislative power to the provincial Legislatures in all matters of a merely local character. Reading ss. 91 and 92 together, their Lordships entertain no doubt that the Summary Convictions Act was within the competence of the Legislature of British Columbia. It relates only to punishment for offences against the provisions of the statutes of the province, and is to be read as if the provisions to this end were expressly declared in some such statute. No other conclusion would appear to be in harmony with the principle of construction laid down by the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (1)

The two preliminary constitutional points having thus been disposed of, their Lordships turn to the facts as proved in the proceedings.

The appellants are dealers in liquor, as importers into the Province and exporters from it, in the City of Vancouver. They possess a warehouse in that city where, on July 15,

(1) [1896] A. C. 348. See also *Toronto Ry. Co.* v. *Toronto City* [1920] A. C. 426, 452.

J. C.
1921
CANADIAN PACIFIC WINE CO. v. TULEY.

1920, they had a large stock of liquor. On that date the respondents, Tuley, Sutherland, Copelands and Thompson, who were police officers, entered the warehouse. Previously some 60 dollars had been marked and handed to a police officer, who had gone to the warehouse to ascertain whether liquor for that amount would be unlawfully sold to him by the appellants. It was so sold and the money in payment therefor was accepted. When the respondents above mentioned entered, they seized the whole stock of liquor there, with the money marked referred to above, and subsequently removed the liquor, books and papers of the appellants from the warehouse. On July 19 one of the respondents, South, laid an information against the appellants under the Summary Convictions Act for unlawfully keeping liquor for sale. On this information the deputy police magistrate before whom the proceedings came convicted the appellants, finding that all the liquor in the warehouse was unlawfully kept there. He ordered it to be confiscated and fined the appellants. On August 9, 1920, the appellants issued the writ in this action claiming replevin and other relief. In due course the action came for trial before Murphy J. The learned judge held that the appellants were entitled to recover the 60 dollars first paid by the police and afterwards seized by them. Whether this decision was right or not, there is no cross-appeal with regard to it. But he further held that the confiscation order of the police magistrate was valid. A second point was made before him to the effect that even if the entry and seizure were lawful, the police became trespassers ab initio, because they seized and carried away the money and books without the authority of a search warrant. But the learned judge held that, even if there were no authority in the terms of the Prohibition Act for these seizures, this fact did not make the police trespassers ab initio. In so far as the seizure of the liquor was concerned, their Lordships agree with Murphy J. This seizure must be taken to be within the statute on the facts proved. *The Six Carpenters Case* (1) left the further point which arises from the unauthorized

(1) (1609) 8 Rep. 146*a*.

seizure of other properties unsettled. But it was subsequently disposed of by the judgment of the Court of Exchequer in *Harvey* v. *Pocock*. (1) There a landlord had taken in distraint, along with chattels that were distrainable, others that were not. It was decided that the distrainer was a trespasser ab initio only as to the goods that were not properly distrainable. Lord Abinger C.B., delivering the judgment of the Court, which included Gurney B. and Rolfe B., decided that the opinion of Lord Holt in *Dod* v. *Monger* (2) ought to be followed, and that where there is an abuse of part only of the distress, the distrainer is not a trespasser ab initio as to what was rightly distrained. Their Lordships find themselves in agreement with this statement of the law. The learned judge held further that the books and papers seized were taken under a search warrant properly issued under the Summary Convictions Act. In any event these books and papers appear to have formed the subject of a separate proceeding, and to have been returned to the appellants. Their Lordships do not think that any substantial question arises with regard to them.

The Court of Appeal affirmed the judgment of the trial judge without adding to the reasons he gave for his judgment.

For the reasons indicated, the Board will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellants : *Budd, Johnson, Jecks & Colclough.*
Solicitors for respondents and intervener : *Leonard & White.*

(1) 11 M. & W. 740. (2) (1704) 6 Mod. 215.

[PRIVY COUNCIL.]

J. C.* 1921 Aug. 1.

MATAMAJAW SALMON CLUB . . . . APPELLANTS;

AND

DUCHAINE (SINCE DECEASED) . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Fishing Rights—Non-navigable River—Grant by riparian Owner—Nature of Right of Fishing—Real Right—Civil Code of Quebec, Arts. 405, 406, 408, 479.

Under the law of Quebec a grant by a riparian owner of the right of fishing, the river being neither navigable nor floatable, confers not merely a usufruct but a real right, at any rate where the terms of the grant are sufficient to pass a right to use the solum for the purpose of fishing. Even if the grant confers only a usufruct, the usufruct does not end with the life of the usufructuary where the deed does not limit the duration of the right granted.

The ownership of a fishing right as a mode of enjoying and disposing of a separate physical subject of possession is consistent with arts. 405, 406, and 408 of the Civil Code. The words "if for life" in art. 479 refer only to the kind of usufruct which is ended by death.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (February 4, 1919) reversing a judgment of the Court of King's Bench of Quebec (November 12, 1917), which affirmed a judgment of the Superior Court of that Province.

The action was brought by the appellants in the Superior Court of Quebec, for a declaration that they were the sole proprietors of the bed of the River Matapédia fronting a certain lot and of the fishing rights therein, and for possession. The appellants claimed under a deed dated September 6, 1890. By the said deed R. A. Blais ceded in exchange to Lord Mount Stephen (then Sir George Stephen, Bart.) "Tous les droits de pêche dans la Rivière Matapédia vis-à-vis le lot du cédant situé . . . ., avec droit par le dit Sir George Stephen

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD PARMOOR, LORD CARSON, and SIR LOUIS DAVIES.

de passer sur le dit lot, tant à pieds qu'en voitures pour l'exercice du dit droit de pêche." The deed then stated that in counter-exchange Sir George Stephen ceded to the said Blais certain land therein described, and continued: "Au moyen de quoi les parties se dessaisissent respectivement de ce que dessus par elles est cédé en échange et en contre échange et s'en saisissent réciproquement, ainsi que leur représentants légaux." Lord Mount Stephen transferred his rights under the deed to the Ristigouche Salmon Club, which transferred them to the appellants.

The defence, which admitted that the river was neither navigable nor floatable, asserted that under the deed of 1890 Sir George Stephen obtained only a personal servitude which was not transferable and was good only against the grantor. The defendant claimed title under a subsequent transfer from the curator of the insolvent estate of Blais. There was also a question of registration which did not arise upon the present appeal.

The trial judge, Roy J., made a declaration that the plaintiffs (appellants) were proprietors of the right of fishing claimed, and ordered the respondents to give possession. On appeal the Court of King's Bench (Archambeault C.J. and Lavergne, Cross, and Pelletier JJ.) affirmed the judgment of Roy J. On a further appeal to the Supreme Court of Canada, that Court by a majority (Anglin, Brodeur, and Mignault JJ.; Idington and Cassels JJ. dissenting) reversed the judgment, holding that under the deed of 1890 Sir George Stephen obtained merely a right of enjoyment which was temporary in its nature, and did not extend beyond his life. The views of the learned judges in Canada appear from the judgment of the Judicial Committee. The appeal to the Supreme Court is reported fully at 58 Can. S. C. R. 222, and that to the King's Bench at 27 Q. R. (K. B.) 196.

1921. July 7, 8. *Lanctot K.C.* and *Kelly K.C.* for the appellants. The grant by Blais was effectual under the law of Quebec to pass a perpetual title to the fishing. The right of fishing is a right of ownership under arts. 405, 406, 407

J. C. 1921 MATAMAJAW SALMON CLUB v. DUCHAINE.

of the Civil Code (1), and is therefore capable of being separately granted and enjoyed. The word "property" in art. 405 is not equivalent merely to "land"; the French text uses the term "biens," which includes (see art. 374) things corporeal or incorporeal, moveable or immoveable. Even if in law the right of fishing cannot be separated from the bed or bank of the river, the grant included by implication the bed; further, the reservation of the right of passage over the bank was sufficient to support the grant of fishing. A right of fishing does not differ in character from a right of mining, the separate ownership of which is recognized by the Code (arts. 2079, 2099), though no express authorization of its grant occurs: *Reg.* v. *De Lery.* (2) The answers of the Seigniorial Court in 1856 to questions 27, 28, 29, and 39 show that under the law of Quebec the right of fishing is a separable right of ownership. The answers were given the force of law by 18 Vict. (Can.), c. 3, s. 16, and the Civil Code contains nothing conflicting with that view. If, however, the right was not one of ownership of property it was a right of usufruct, which did not come to an end with the death of the usufructuary. The words "if for life" in art. 479 are a recognition of the power of an owner to grant for a period extending beyond the life of the usufructuary. The language of the grant shows that it was intended to be in perpetuity. The grant did not "contravene the laws of public order or good morals" so as to be invalid under art. 13. A usufruct can be granted for more than life: Guyot Répertoire de Jurisprudence (Paris, 1783), p. 403, s. 5, § 1. [Reference was also made to arts. 414,

(1) Civil Code of Lower Canada: "405. A person may have on property either a right of ownership, or a simple right of enjoyment, or a servitude to exercise. 406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations. 408. Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory, whether naturally or artificially. This right is called the right of accession." "479. Usufruct ends by the natural death of the usufructuary, if for life; by the expiration of the time for which it was granted. . . . ."

(2) (1883) 9 Q. L. R. 225, 232.

443, 499, and to Aubry et Rau Droit Civil Francais, vol. ii., p. 445.]

St. Laurent K.C. for the respondent. The respondent purchased in good faith a lot which belongs to him with all its appurtenances. The law of Quebec does not recognize a right of fishing in a non-navigable river as a real right which can be enjoyed separately from the solum. The trial judge held that no part of the solum passed and there was no appeal from that decision. In art. 405 "property" means corporeal things, with which alone that article deals. Arts. 405 and 406 must be read together. The Seigniorial Court was dealing only with navigable rivers, in which the right of fishing was created by sovereign authority. The answers do not apply to non-navigable rivers, in which the fishing is merely an incident of ownership. The answers do not indicate that a private individual can dismember the estate in the manner contended for. The system of law in Quebec does not contemplate any such dismemberment. The Code does not recognize any right intermediate between ownership and usufruct. The right granted was necessarily merely a right of enjoyment. The language of the deed is consistent with the right being merely usufructuary. The term "seisin" is used in the Code in connection with incorporeal rights: see art. 607. Art. 479 does not deal with a usufruct extending beyond the life of the usufructuary, because the system of property in Quebec did not contemplate that as possible. [Reference was made to Pothier, Ed. Bugnet, vol. i., p. 312, and to Mignault on the Civil Code, p. 464.]

Aug. 1. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada which reversed (by a majority consisting of Anglin, Brodeur and Mignault JJ.; Idington and Cassels JJ. dissenting) a judgment of the Court of King's Bench of Quebec, affirming a judgment of the Superior Court.

The question to be decided relates to the title of the appellant club to the fishing rights in a stretch of the Matapédia

J. C. 1921 MATAMAJAW SALMON CLUB v. DUCHAINE.

River opposite to a certain piece of land on one of its banks, and to the bed of the river itself at that place. It is common ground that there is title of some sort to a right of fishing there. The appellants claim that this title is not only vested in them, but is a right in perpetuity. The respondents maintain that it has never amounted to more than a right personal to the individual who originally acquired it, and terminable with his life.

A further point was raised on behalf of the respondents, which was in substance that even if Lord Mount Stephen, the original holder, possessed and had conveyed a transmissible right, that right no longer subsisted in the appellants by reason of failure in renewing the registration of the deed by which it was originally conveyed to Lord Mount Stephen. This point was, however, decided adversely to the respondents in all the Courts below, the Supreme Court of Canada having affirmed, so far as the point was concerned, a declaration made by the Court of King's Bench of Quebec on the subject. As the respondents have lodged no cross-appeal against the judgment of the Supreme Court on this point, their Lordships hold that it cannot be raised in the present appeal. The only question before them therefore is that as to the character of the title acquired by Lord Mount Stephen and transmitted by him.

In order to see what this title really was it is in the first place necessary to examine the character of the deed of September 6, 1890, by which Lord Mount Stephen, then Sir George Stephen, acquired it. That deed was one of exchange, and under it one Randolph Alexander Blais, purported to cede by way of exchange all the rights of fishing in the River Matapédia vis-à-vis the lot of the cedant, as described in a plan annexed, "with right to the said Sir George Stephen to pass over the said lot, on foot or in vehicles, for the exercise of the said right of fishing." There was ceded in counter-exchange by Sir George Stephen on his part a certain piece of land in the deed described. Consequently, "the parties disseised themselves respectively of what was above ceded by them in exchange and counter

exchange, and took seisin of it reciprocally." The deed was registered.

It will be observed that the language of the deed itself is unrestrained, so far as the duration of the rights granted under it is concerned, not less completely in the case of the cession of the fishing rights to Sir George Stephen than in that of the cession of land by way of exchange to Blais. The introduction of the words relating to reciprocal disseisin and seisin point to an intention to convey in perpetuity in each case. Unless the words "right of fishing" import in the character itself of the title granted something short of a perpetual right, there is no restriction in the deed itself on the duration of the right.

The action out of which the appeal arises was brought by the appellants against the predecessor in title of the respondents, because the latter had interfered with the alleged exclusive title of the appellants to the fishing rights in question, and had formally denied its validity. The action was for a declaration that the appellants were the sole proprietors of the part of this river and of its bed so far as these fronted the bank at the locus in quo, as well as of the fishing rights, and for possession. The defence, which admitted that the river was unnavigable and non-floatable, and that there existed the alleged formal documents of title relied on by the appellants, denied possession in the past, and asserted that Sir George Stephen obtained no more than a personal servitude which was not transferable and was operative only against Blais and his heirs. The defence further alleged that the curators in bankruptcy of Blais had duly sold the land to which the fishing rights were opposite, to the predecessor in title of the respondents who had thus become its proprietor. It was further pleaded that if the appellants had acquired a right it had lapsed for want of renewal of registration as prescribed by law.

The action was tried in the Superior Court of the Province of Quebec before Roy J. That learned judge decided in favour of the appellants, declaring the appellants to be proprietors of the rights of fishing in the river opposite the bank

J. C. 1921 MATAMAJAW SALMON CLUB v. DUCHAINE.

at the locus in quo, and decreeing their right to possession. Roy J. considered a number of statements of the law contained mainly in French and Quebec text-books and decisions, and held that what was passed to Sir George Stephen was a real right or one of property, which had been validly conferred in perpetuity in favour of a non-riparian proprietor, and had been duly transferred by him to the appellants. The Court of King's Bench of the Province on appeal took the same view, holding that the law of Quebec permitted the creation of such a right of property, including a right to the bed of the river to the extent required for the purposes of fishing, so far and so long as this purpose necessitated it for its efficacy. In that Court Pelletier J. agreed in substance with the reasoning of Roy J. Archambeault C.J. found rather more difficulty, but he also arrived at the conclusion that the right in question was a real right available against the world, and created by the dismemberment of immovable property. Even the old law of France had apparently regarded as possible the creation, by dismemberment of the original right of property, of a servitude of this kind. But in that law there was the difficulty that personal servitudes were prohibited, and the right to fish would have become a personal servitude if it had been alienated in perpetuity for the benefit of a person and not for the benefit of an immovable. But in the law of Quebec, the learned Chief Justice considered this difficulty did not arise, for personal servitudes were admitted. Whatever might be the precise character of the right, he was of opinion that it was not merely a right of personal servitude, but one of usufruct which Sir George Stephen had obtained not only for himself but for his representatives. This would in itself be enough to call for a decision in favour of the appellants, for Sir George Stephen was still living. But the Chief Justice went further. A full right of property comprises a jus utendi, a jus fruendi, and a jus abutendi. This full set of rights was possessed by the owners of the river bank, with a title extending to the centre of the stream. A usufruct comprises only the first two of these three rights. If these were ceded a usufruct

was established. It would not comprise merely personal rights, but a veritable real right. And it was because what took place was the dismemberment of the property in an immovable, that the right of the usufructuary was a true real and immovable right of servitude.

In the Supreme Court of Canada Mignault J. expressed the opinion that in the law of the Province of Quebec there was nothing similar to the English common law right of profit-à-prendre, a right which might be created in perpetuity, to enter the land of another person and to take some profit of the soil or a portion of the soil itself for the use of the owner of the right. In Quebec he held that real servitudes can be granted for the benefit only of an immoveable and not of a person. The title in question could not, accordingly, be one of real servitude. Nor was it a right of ownership, for the purchase was not one of the river bed. It gave no more than a right of enjoyment, with at most the right to pass over the land of the grantor so far as necessary for the exercise of the title to fish. There was no real servitude within the Code, for the provisions there relate only to a "charge imposed on one real estate for the benefit of another belonging to a different proprietor." It was only in virtue of a right of enjoyment that Sir George could use the river bed, and he was not made co-owner of it. No doubt if, as Chief Justice Archambeault thought, the right was one of usufruct, this would be a right of enjoyment differing from both ownership of a profit-à-prendre and from a real servitude. The old French law recognized such a right and that it could be restricted to certain fruits or products of a property. But could such a right extend beyond the life of Sir George Stephen or be assigned by him? That it could be assigned Mignault J. had no doubt. But on the other hand it was in his opinion only temporary and could not be granted in perpetuity. This was in his view not only to be expected as the outcome of public policy, but was prescribed by art. 479 of the Quebec Code, which said that usufruct ends by the natural death of the usufructuary, if for life, by the expiration of the term for which it was granted. These words meant that the usufruct might

J. C. 1921 MATAMAJAW SALMON CLUB v. DUCHAINE.

be created for life or for a term only. In the former case it ended with the life of the usufructuary, in the latter with the term. The reasonable construction was that if no term were fixed the usufruct ended with the life of the usufructuary. This view accorded with the general law of France, as stated by certain of the commentators, and with the Roman law. The right of Sir George Stephen was therefore one of mere enjoyment, but it should be made clear in the judgment that it would not come to an end till he died.

Anglin J. and Brodeur J. expressed similar views on the main question discussed by Mignault J. Brodeur J. added that, in his opinion, registration of the conveyance to Sir George Stephen had been essential.

Idington J. was of a different opinion from that of the majority. It was to him clear that the substance of the transaction was that what Sir George Stephen bargained for was not merely a personal right, and unless the language of the deed and the state of the law rendered it necessary to hold otherwise it should not be so held. There were no doubt rights of personal servitude known to the law which ceased with the life of the grantee. But in his view there was no prohibition in the law of Quebec against an owner in perpetuity of property dismembering his property in any way he chose. The deed itself ran in terms which showed dismemberment as being the purpose for which it was framed.

Cassels J. agreed with the conclusions of Idington J. The deed purported to be a conveyance of property. The question whether the right sought to be granted was in the nature of a profit-à-prendre, and whether such a right was known to the law of Quebec was, in his opinion, one of language only. The analogy of the grants by the King of France of rights to fish in the St. Lawrence River, to seigniors, showed that such a title as was claimed through Sir George Stephen was possible, for the rights in such cases were more than rights during the lifetime of the seignior.

In considering which of these diverging sets of opinions is right, their Lordships are impressed with the necessity of bearing in mind that the principles on which the jurisprudence

of Quebec with regard to rights in land rests are very different from those which obtain in the common law of England. In the latter country there has always been permitted great latitude in splitting up the title to the fee simple, with important results as regards the right of possession. But in other countries, such as those where the Roman law prevails, and in countries such as Scotland, which has its own system, the fee simple cannot be so freely disintegrated. The property title may, as for example in the latter country, be in the main indissoluble, a right for life only being treated, not as a separate right of property as in England, but as a mere burden on the radical title. It follows that it is necessary to ask at the outset how far the system in Quebec has permitted encroachments on the radical right of property.

It appears that at all events to some extent, and quite apart from the Code, such encroachments have been permitted. The Seigniorial Court, to which fell the duty, under the Seigniorial Act of 1854 passed for Lower Canada, of giving authoritative answers to questions specially submitted to it, relating to the terms on which feudal rights were to be abolished in Lower Canada, gave an answer to Question No. 27 submitted to it which bears on this point. The Court declared that "in seigniories bounded by a navigable river or stream, seigniors could lawfully reserve to themselves the right of fishing therein, or impose dues on their tenants (censitaires) for the exercise of that right, when the right of fishing in the same had been granted to them, but they could not make the reservation nor impose the dues without grant and as seigniors only." This answer implies that a right of fishing could be excluded and held separately from the right of the tenant to the land held by him under the seignior. Although the answer is concerned only with navigable rivers or streams, their Lordships see no reason to think that this makes any difference to the principle. If the title to the fishing could be separated from that to the other rights in the land in the case of a navigable river, it does not appear that there is any reason for coming to a different conclusion in the case of a river that is non-navigable. In the present case it

J. C. 1921 MATAMAJAW SALMON CLUB v. DUCHAINE.

is common ground that the tenure of the land to which the fishing rights belonged was not seigniorial, but was of the ordinary kind. The question is therefore whether the owner of the land could, in virtue of his general title, divide or split off the fishing rights which fell within his ownership and convey them separately as a subject of property strictly so called. That such a division could take place in the case of seigniorial lands appears from what has been quoted. If so, it must have been because the law of Quebec permitted fishing rights to be isolated as separate items from the aggregate of proprietary rights. The land and the fishing rights constitute, in other words, separate subjects. It may be that no grant of fishing rights is practically possible without its comprising some right of using the solum. If this be so then the terms of the cession are sufficient to have passed such a right. Even if the right to fish and to use the solum for the purpose constituted no more than a usufruct, this would not, in their Lordships' opinion, constitute a difficulty in the appellants' way. For according to some at least of the French authorities cited in the judgment of Roy J., such a right may be a transferable one. Their Lordships do not think that art. 479 of the Civil Code of Quebec ought to be read as cutting down the duration of such a right, at all events when granted under circumstances in which there is no practical objection to its existence in perpetuity. That article provides that "usufruct ends by the natural or civil death of the usufructuary, if for life," or "by the expiration of the term for which it was granted." Their Lordships see no sufficient reason for treating the words "if for life" as doing more than refer only to the kind of usufruct which is ended by death. They have considered what was said on this point by Mignault J. in his judgment in the Supreme Court. But after consideration of the authorities it appears to them that, however marked was the tendency in the earlier Roman and French law to restrict what was called usufruct to a personal title, this tendency became relaxed in the later phases of both of these systems, to such an extent that the expression usufruct became so general as to extend to rights

analogous in incident to those of property. They are impressed by the reasoning of Archambeault C.J. in the passage in his judgment already referred to in which he comes to the conclusion that at least in modern times dismemberment of the complex of property rights is now possible under Quebec law, through which a usufruct may be created which is a veritable right in rem. As he points out a usufruct is a right of enjoying things in which another possesses the property. But he adds that it may, by a splitting off of incidents in that property, become a true real right against all who seek to interfere with it.

Their Lordships, in agreement so far with the Chief Justice, think that the right here was more than usufructuary in the older and stricter meaning. In their opinion it is a right to a separable subject or incident of property. There is no inherent reason for refusing to treat a fishing right as a self-contained and separable subject. In the seigniorial cases they appear to have been treated as self-contained and separable. In the law of Scotland, where the fee cannot be split up, they are regarded as proper subjects for a separate title to property in fee. The definition in art. 405 of the Quebec Code presents this analogy, that it places no difficulty in the way of regarding the right of fishing as an item among the others comprised in the subject matter. It says, in general terms, that "a person may have as property either a right of ownership or a simple right of enjoyment or a servitude to exercise." Art. 406 says that "ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations. Art. 408 provides that "ownership in a thing, whether moveable or immoveable, gives the right to all it produces, and to all that is joined to it as an accessory, whether naturally or artificially. This right is called the right of accession. There appears to be no reason why, consistently with the language of these articles, there should not be ownership of a fishing right as a mode of enjoying and disposing of a separable physical subject for possession. The title to take the fish is a title to take a product of the

J. C. 1921 MATAMAJAW SALMON CLUB v. DUCHAINE.

river, and art. 408 recognizes as possible in law the union with it as an accessory of the right to use the bed of the river or the banks when naturally or artificially stipulated for as part of that which is joined to the fishing right. Their Lordships not only think that this conclusion is that which is natural, having regard to the character of the transactions which the law of Quebec was probably fashioned to provide for, but they find confirmation of the view they take in the authority cited in support of it in the judgments of both Roy and Pelletier JJ.

They will therefore humbly advise His Majesty that the judgment of the Supreme Court of Canada should be reversed, and that the judgment of the Superior Court of the Province of Quebec should be restored. The respondents must pay the costs here and in the Courts below.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Stephenson, Harwood & Tatham.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *July* 1.

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK . . . . . } APPELLANTS;

AND

BRITISH BANK FOR FOREIGN TRADE, LIMITED . . . . . } RESPONDENTS.

Practice—Commercial Court—Declaratory Order—Mortgage—Redemption—Loan by Foreign Bank to English Bank on Security of Bonds—Construction—Action in King's Bench Division for Declaration as to Terms of Redemption—Transfer to Commercial Court—Jurisdiction—Discretion—Amendment—Rules of Supreme Court, Order XXV., *r.* 5.

An English bank obtained a loan from a Russian bank on the security of certain bonds. A question having arisen upon the construction of the contract whether the loan was repayable in roubles or in sterling, the borrowers commenced an action against the lenders in the King's

* *Present:* VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

Bench Division, which was transferred to the Commercial Court, claiming a declaration that they were entitled to the possession of the bonds upon payment of the amount of the loan in roubles, and an injunction restraining the lenders from parting with the bonds save by delivery of the same to the borrowers against such payment. Roche J. held, upon the construction of the correspondence as pleaded, that the loan was repayable in sterling and dismissed the action. The Court of Appeal, after allowing an amendment which let in some further correspondence, declared that the loan was repayable in roubles, and gave liberty to the borrowers to take proceedings in the Chancery Division to redeem their securities, but granted no further relief in the action :—

Held, by Lord Dunedin, Lord Sumner, and Lord Parmoor (Viscount Finlay and Lord Wrenbury dissenting on the ground that the action ought to be dismissed as irregular) that the loan was repayable in roubles, and, notwithstanding that the action, being an action for relief which was incidental to a redemption action, was brought in the wrong Court, that there was in the circumstances no ground for interfering with the discretion of the Court of Appeal in making the declaration or in allowing the amendment.

The discretion of the Commercial Court as to making declarations under Order xxv., r. 5, considered.

Order of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Roche J.

In May, 1914, the respondents, the British Bank for Foreign Trade, Ld., applied to the appellants, the Russian Commercial and Industrial Bank, for a loan of 77,657*l.* sterling for a short term against the security of Baku 5 per cent. Bonds and Chinese Government 5 per cent. Bonds to be deposited in a bank in Brussels.

After some further negotiations the respondents, on June 26, 1914, deposited 30,000*l.* City of Baku 5 per cent. Gold Bonds with the Crédit Anversois, and 60,000*l.* Chinese Government 5 per cent. Gold Bonds with the Société Belge de Crédit Industriel at Brussels, at the disposal of the appellants' London branch, and on June 29, 1914, the appellants paid to the Commercial Bank of Siberia to the credit of the respondents 750,000 roubles. The sterling equivalent of the said amount of roubles at that date was 78,206*l.* odd.

A question having arisen upon the construction of the correspondence between the parties whether this loan was repayable in roubles or in sterling, the respondents, on September 12, 1919, issued a writ in an action in the King's Bench

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD.

Division against the appellants, claiming (1.) a declaration that the respondents were entitled to the possession of the Chinese and Baku Bonds upon payment to the appellants at their London Branch of 750,000 roubles or the equivalent thereof in British currency, (2.) an injunction to restrain the appellants, their servants or agents from parting or in any way dealing with the securities save by delivering up the same to the respondents against the payment of the 750,000 roubles or their equivalent.

By an order of Bailhache J. of November 19, 1919, this action was transferred to the commercial list.

This case is reported only on the question whether in the circumstances the Court ought, in the exercise of its discretion under Order XXV., r. 5, to make a declaratory order.

At the trial of the action Roche J. on December 4, 1919, held, upon the construction of the correspondence as pleaded, in favour of the defendants (the appellants) that the loan was a sterling loan. With reference to the question whether in any event the Court ought to make the declaration claimed the learned judge proceeded: "It is said on behalf of the defendants that at all events this Declaration that is asked for ought not to be made, and the injunction which is asked for ought not to be granted because if it is a rouble loan, contrary to my decision, then the Plaintiffs are not able to repay the persons who have made it in the currency of the country, or at the place where the payment ought to be made. Therefore, this relief that is asked for, which is really ancillary to or in lieu of the relief which would be granted to a mortgagor of securities in a redemption action, ought not to be granted, and I think there is a great deal in that contention. The fact is this: if it was a rouble advance, it was certainly made by the main office of the Defendant Bank in Petrograd. The deposit of securities in Brussels was made in favour of the London Agency, who were here represented before me. There is no question that the London Agency can be sued and can be brought here, but the matter does not rest there. The point is whether it would be equitable or proper if I thought that the repayment ought to be made in Petrograd that in

an indirect way redemption should be decreed when no such repayment is possible owing to a misfortune that is common to both parties as well as common to a vast number of the members of suffering humanity, namely, that an uncivilised Government is running in Russia and that matters are in such chaos that no repayment can be made or is possible. If my opinion as to the contract were different from the one which I have indicated, I should hesitate very long before I thought it either equitable or proper to grant the relief claimed in this action." He accordingly dismissed the action with costs. By the formal judgment it was "adjudged that the plaintiffs do recover nothing against the defendants" and that the defendants recover their costs against the plaintiffs.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.), after allowing an amendment which let in some further correspondence, upon a review of the correspondence as a whole, declared that the loan was a rouble loan repayable in roubles and not a sterling loan, and gave liberty to the respondents to take such proceedings in the Chancery Division as they might be advised to redeem their securities, but made no order upon the claim for an injunction. The Court allowed the appeal with costs, but ordered that there should be no costs of the action inasmuch as it was wrongly brought in the Commercial Court.

1921. May 6, 9, 10. *Douglas Hogg K.C.* and *W. P. Spens* for the appellants. This being an action in the nature of a redemption action, it has been brought in the wrong Court. This is an attempt by the mortgagor, by means of a declaration in the Commercial Court in an action brought in the King's Bench Division, to obtain by anticipation relief which could only be obtained in a redemption action in the Chancery Division, and then only on condition that the plaintiff offered to redeem. It is a device to secure the advantages of a redemption action without incurring the liability which such an action involves. This is therefore not a proper case for the exercise by the Court

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD.

of the discretion conferred upon it by Order XXV., r. 5. The power of the Court to make a declaration under that Order where no consequential relief is granted should be exercised with great caution: *In re Staples* (1); *In re Clay* (2); *Guaranty Trust Company of New York* v. *Hannay & Co.* (3); *Faber* v. *Gosworth Urban Council* (4); *Grand Junction Waterworks* v. *Hampton Urban Council* (5); *Burghes* v. *Attorney-General* (6); *Austen* v. *Collins* (7); *Markwald* v. *Attorney-General.* (8) And it is not the practice of the Court, in the absence of special circumstances, to make a declaration with reference to future rights: *In re Staples* (1); *Honour* v. *Equitable Life Assurance Society of the United States* (9); *Barraclough* v. *Brown.* (10) The action is misconceived and ought to be dismissed in any event.

Sir John Simon K.C. (with him *R. A. Wright K.C.*, *Sir Cassie Holden* and *du Parcq*) for the respondents. It was plainly within the jurisdiction of the Court of Appeal to make the declaration appealed against. Therefore the question becomes one of discretion. It is true that one of the claims in the action might have been included in a redemption action, but it was perfectly legitimate for the respondents to seek to ascertain the true construction of the contract. Commercial people wanting to know where they stand would naturally come before the Commercial Court. If this had been an unsecured loan and the time for payment had not arrived it could not have been doubted that the Commercial Court could properly have made a declaration as to the effect of the contract, and it is submitted that the giving of the security makes no difference.

Douglas Hogg K.C. replied.

The House took time for consideration.

1921. July 1. VISCOUNT FINLAY. My Lords, the appellants are a Russian bank with their head office in Petrograd

(1) [1916] 1 Ch. 322.
(2) [1919] 1 Ch. 66.
(3) [1915] 2 K. B. 536.
(4) (1903) 88 L. T. 549.
(5) [1898] 2 Ch. 331, 345.
(6) [1911] 2 Ch. 139, 156.
(7) (1886) 54 L. T. 903, 905.
(8) [1920] 1 Ch. 348, 357.
(9) [1900] 1 Ch. 852, 855.
(10) [1897] A. C. 615, 624.

and a branch in the City of London. The respondents are a British bank incorporated under the Companies Act carrying on business in the City of London. The action was begun on September 12, 1919. The British bank had borrowed from the Russian bank, depositing certain securities. The writ claimed a declaration that the British company were entitled to the possession of the securities upon payment to the Russian bank at their London branch of 750,000 roubles, or the equivalent value thereof in British currency. The question which this action was intended to settle is whether the loan which the Russian bank had made was a sterling loan or a rouble loan. Owing to the enormous depreciation in the value of the rouble the lenders would, if the loan was a rouble loan, be entitled to receive a mere fraction of the sum to which they would be entitled if the loan was a loan in pounds sterling.

The case has been argued at your Lordships' Bar on two points which are quite distinct—namely, whether a declaration of this nature can properly be asked for in a declaratory action, or whether it should be left for determination in a suit for redemption, and whether the loan in the present case was a sterling or a rouble loan. [Upon the latter question his Lordship thought that if no more evidence was available than that which was at present before their Lordships the loan ought to be held to be a sterling loan, but, in view of the possibility that there might be further evidence when the point came up for decision in a regular way in a suit for redemption, he expressed no final opinion on the point; and he continued as follows:]

In my opinion the present suit was improperly brought and ought not to have been entertained. Scrutton L.J. states very clearly and forcibly the grounds on which he doubted whether the action ought to have been entertained although he ultimately agreed in allowing the appeal: "This is a very unsatisfactory, and, on the point we have to decide, a rather difficult case. The unsatisfactoriness appears to me to arise from the fact that the Plaintiffs have brought into the Commercial Court an action in which they have

H. L. (E.) 1921

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD.

Viscount Finlay.

picked out such parts of an action of redemption as are in their favour, and have avoided the consequences against them which would have followed in bringing the action for redemption in the proper Tribunal, in the Chancery Division. If they had proceeded in the Chancery Division for redemption, they would have had to offer to pay the sum found due by the Court. They do not want to do that apparently, they want to redeem if they can pay in roubles, but they have no particular anxiety at present if they have to pay in sterling. Roche J. was quite impressed with this aspect of the case; he found against the Plaintiffs on the declaration they wanted, but he said if he had found in their favour he was not at all clear, in fact he was inclined to think he would not have given them the declaration they asked for for the reasons he pointed out, and I have seriously doubted whether this Court ought not simply to dismiss the action on the ground that it is brought before an inappropriate Tribunal. But I cannot help seeing the result of that is, if an action for redemption is brought in the Chancery Division, the Chancery Judge will feel, out of the courtesy which prevails between Judges, bound to follow the opinion of the Judge in the King's Bench Division, and the parties would then have to come to the Court of Appeal again and argue over again the question which has been argued at length in this Court. On that ground I think we may be justified in making the declaration on the one point of construction whether on the documents and facts this loan was a sterling loan repayable in sterling or a rouble loan repayable in roubles; but I hope that the Commercial Court Judges will be strict in seeing that their Court is not made use of for purposes which do not properly fall within its jurisdiction, as I think has been done in this case." The jurisdiction to give a declaratory judgment rests on Order xxv., r. 5, which is as follows: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

This is a very wide power and it is obvious that it is one that should be exercised with the utmost caution. The appellants (the Russian bank) objected to its exercise before Roche J. and also before the Court of Appeal. We are informed that they also objected to the making of the Order of November 19, 1919, by which the case was transferred to the Commercial list. They ought, I think, to have made a much more determined stand at that point than they did, and they should have applied to have the action stayed on the ground that it was not a case for a declaration, and that the point should be decided in due course in a suit for redemption. There are, as Scrutton L.J. points out, grave objections to permitting a mortgagor to pick out one point and ask the Court to give its opinion on it to help him to make up his mind whether it is in his interest to apply to redeem. The appellants, however, did press in both Courts below the objection to making any declaration of the kind. I think they ought to have acted more decisively and at some earlier stage. But the matter is not one which concerns the parties merely; it concerns also the proper administration of justice, and it appears to me that we ought to express our opinion upon the point whether the suit was rightly brought and should be entertained. The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by Mr. Hogg. It should be exercised sparingly (*In re Staples* (1)); "with great care and jealousy" (*Austen* v. *Collins* (2)); "with extreme caution" (*Faber* v. *Gosworth Urban District Council* (3).) Stirling J. took the same view on this subject in *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (4), and Lord Sterndale, in *Markwald* v. *Attorney-General* (5), said that there had been "too great a tendency of late years to ask for declarations."

Of course it is true that there are at present no Courts in Russia in which it is possible to have questions of this kind

(1) [1916] 1 Ch. 322.
(2) 54 L. T. 903, 905.
(3) 88 L. T. 549, 550.
(4) [1898] 2 Ch. 331, 345.
(5) [1920] 1 Ch. 348, 357.

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Viscount Finlay.

conveniently decided, but if the case is one in which the English Courts are to exercise jurisdiction it must be in the regular way. Order XXV., r. 5, was never intended to enable the mortgagor to pick out a point on which it might be convenient for him to know the law before applying to redeem and ask the Commercial Court to decide it for him in this summary way by declaration. It is also by no means clear that further evidence may not be available bearing upon the question on which a declaration is asked. This is indeed the vital question as between the mortgagor and mortgagee in the case of this loan. There ought to be a suit for redemption, and it would be, in my opinion, very rash to rush into a decision on this most important point in proceedings irregularly instituted and when it is uncertain whether we have all the proper materials before us. If it is to be decided now I think that the declaration of Roche J. should be restored, but in my view the proper course to take is to dismiss the action, giving the appellants the costs of this appeal but no costs in the Courts below.

LORD DUNEDIN. My Lords, the facts upon which the question before the House arises are, in the briefest form, as follows: The appellants, on the eve of the war, lent the respondents a sum of money who, in security for repayment, transferred to them, by way of mortgage, certain securities. The appellants and the respondents are not at one as to the terms of the loan. The appellants say it was a sterling loan —repayable in sterling. The respondents say it was a rouble loan—repayable in roubles. If the respondents are right, it is obviously in their interest to take advantage of the present rate of exchange, pay the loan, and get back the securities. In order to bring the matter to a test they raised the present action, asking for a declaration to the effect that the loan was a rouble loan. Such an action was, they said, competent under Order XXV., r. 5. The respondents enrolled the action for transference to the Commercial Court. It was transferred, and no application was made to have it taken away from that Court. The Commercial judge found, on the

reading of two letters which were in the pleadings set forth as containing the contract, that the loan was a sterling loan and dismissed the action. On appeal, it was argued that the contract was not contained in the two letters only on which the Commercial judge had proceeded, but on an extended correspondence. Reading that correspondence, the Court of Appeal allowed an amendment of the pleadings and made the declaration asked—namely, that the loan was a rouble loan. [Upon that question his Lordship agreed with the result arrived at by the Court of Appeal, and he continued as follows :]

Though I have, for convenience sake, dealt with the merits of the dispute between the parties, there is another question raised, and very strenuously argued, before your Lordships, which logically comes first ; and that is, whether this was a proper case for granting such a declaration as the one asked and given. As I am aware that your Lordships are divided in opinion on this point, I have considered the question with repeated care. The power to grant a declaration rests on Order xxv., r. 5, which is in the following terms : "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

It is said that it ought not to have been granted by the Court of Appeal in a case coming to them from the Commercial Court, in view of the fact that an action of redemption can only be raised in the Chancery Division.

Now, the Chancery Division, as I understand it, is not in the strictest sense of the word a separate Court from the King's Bench Division. They are each of them parts of the High Court of Justice. I do not think, therefore, that it can be successfully urged that this is the case of a Court granting a declaration in a matter where it was powerless to grant consequential relief. But then it is said that the granting of a mere declaration is a matter of discretion, and that that discretion ought to be shown in granting such

H. L. (E.) 1921

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD.

Lord Dunedin.

declaration "sparingly," "with great care and jealousy" and "with extreme caution." My Lords, I confess that to my mind such expressions give little guidance. It may be that I am swayed by my experience of another system of law, but a rule which can be expressed in the form of a principle may well be proper to any legal system. Your Lordships are aware that the action of declarator has existed for hundreds of years in Scotland. It was praised, with envy, by Lord Brougham, in your Lordships' House, in the case of *Earl of Mansfield* v. *Stewart* (1) long before the genesis of Order xxv. r. 5. The rules that have been elucidated by a long course of decisions in the Scottish Courts may be summarized thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

Applying this rule to the present case, this is in no sense a theoretical question. Moreover it is obvious that it is a matter of real importance to the respondents, as guiding their rule of conduct, to know whether the loan is truly a rouble loan or a sterling loan. In the one case, they will probably redeem; in the other case, they will not. Further, there is no doubt that there is here secured a proper—and, indeed, the only—contradictor.

In my opinion, unless you are to rob declarations of much of their real value, this is a case in which a declaration ought to be given. It was argued by the appellants' counsel that this was a mere device on the part of the respondents to evade the liability which would necessarily ensue if they raised an action of redemption in which no progress could be made until they had become bound to pay what the Courts should find due. But was it not a legitimate device? I think it was. May I here give an illustration of the same sort of position from one of the many decided cases in Scotland: *Chaplins' Trustees* v. *Hoile.* (2) In that case an estate was held by a person in liferent under a disposition by a

(1) (1846) 5 Bell, 139, 160.

(2) (1890) 18 R. 27.

testator. The deed contained a provision by which the liferenter was debarred from voluntarily selling his liferent, and the provision was fortified by clauses of forfeiture and irritancy. The liferenter raised an action to have it declared that the clauses of forfeiture and irritancy were bad, and he called as defender the fiar in whose favour the clause of forfeiture would operate. Besides pleading on the merits the fiar tabled a plea to the competency of the action. The competency was sustained, and the action dismissed on the merits. Lord Young, who gave the leading judgment in the Inner House, said that it would be out of the question to hold that the liferenter could only find out what were his rights by the test of actual experiment—an experiment that would be fatal to him if his views as to his legal position were wrong.

I confess I can see no impropriety, but rather the reverse, in the respondents wishing to know whether they or the appellants were right as to the point whether the loan was a sterling loan or a rouble loan before they made up their minds as to whether they should or should not set up an action of redemption. I should say the same if the persons asking for declaration were contemplating an action of foreclosure.

I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend Lord Wrenbury. I note that he says that if a declaration such as this had been asked for in the Chancery Division the action would have had short shrift unless amended so as to turn it into an action of redemption. I accept my noble friend's statement, and I find that Scrutton L.J. refers to this practice of the Chancery Division as the Ark of the Covenant. Perchance I venture the fate of Uzzah at the threshing floor of Nachon, 2 Samuel, cap. 6, yet I say that in my opinion the practice is wrong; that it stultifies Order xxv., r. 5, and denies justice to the litigant who asks it; and that the sooner it is altered the better.

While these are my opinions, I should not feel justified in giving a vote which is virtually a casting vote on this ground,

H. L. (E.) 1921

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD.

Lord Dunedin.

for I recognize that I can scarcely lay down by myself in this House rules for exercise of discretion by the English Courts when such discretion has not hitherto been administered so far as I can see by any rule.

I can only hope that my remarks will be taken as obiter dicta and that when the occasion next arises they will be considered on their merits.

But taking the matter as one of pure discretion, then I find that a discretion has been exercised, and I do not see why I should interfere with it. I am also greatly moved by the cogency of the remarks of Scrutton L.J., who considered what would be the result in this case of a refusal to make a declaration.

The only thing that troubled me was the idea that, the amendment being allowed only after the case was debated in the Court of Appeal, it might not be fair to make such a declaration then. If the appellants had been really prejudiced by this course, I should not have felt that the declaration should be granted. But it was open to the appellants to ask for an opportunity of leading further evidence. This they did not do. And it is not sufficient reason, in my view, for denying a declaration that, if a declaration is not given and the respondents are driven to a fresh action, something may turn up which may help the appellants' case.

I am therefore of opinion that the appeal should be dismissed. In view, however, of the fact that a great deal of the controversy has been caused by the transference of the cause to the Commercial Court—a course which I understand all your Lordships think was erroneous—I think there should be no costs of this appeal. I move accordingly.

LORD SUMNER. My Lords, the defendants had such a branch in London as made service of a writ there good service and obliged them, though a foreign corporation, to appear or allow judgment to go by default. The action was therefore validly begun and the High Court had jurisdiction to try it. This does not appear to be disputed or disputable. In what division

of the High Court ought such a writ to have been issued? It is endorsed thus:—"The Plaintiffs' claim is for (1.) A Declaration that the Plaintiffs are entitled to the possession of" certain securities "upon payment to the Defendants at their London branch of 750,000 roubles or the equivalent thereof in British currency. (2.) An injunction to restrain the Defendants . . . . from parting . . . . with the . . . . securities aforesaid save by delivering up the same to the Plaintiffs against payment of 750,000 roubles . . . . (3.) A receiver. (4.) Further or other relief." My Lords, I think it is fairly plain that this indorsement is a claim for a declaration that the plaintiffs, as borrowers, are entitled to redeem a security on certain terms, and for intermediate relief, but that the words "redeem" and "redemption" have been advisedly omitted. The action, therefore, was one which the Judicature Act assigns to the Chancery Division. It may be that in that Division the action might have been dismissed forthwith in the form in which it was begun, leaving the plaintiffs to commence another action claiming redemption in the usual way. In any case it should not have been allowed to proceed without amendment of the indorsement, and, as will be seen later, I do not think anything more would have been heard of the claim for a declaration, but it is a different question which arises now. Within two months of the service of the writ and as the first step in the action Bailhache J. transferred it to the Commercial List of King's Bench actions. To any one familiar with the practice in commercial actions it is quite plain what happened.

There is no doubt a preliminary question, I will not say a separable one—namely, whether the loan was a rouble loan or a sterling loan or, more precisely, whether in order to redeem the plaintiffs ought to tender roubles or sterling. This was not a mere question for the plaintiffs to decide for themselves with or without legal advice; a sufficient issue had arisen before writ between borrowers and lenders to make the question one in actual dispute between them. The borrowers had asserted an obligation on their part to repay

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Lord Sumner.

roubles only. The value of the rouble, or the absence of it, is such that nothing but meek assent on the lenders' part could be taken as less than a dissent from this suggestion. The lenders replied tactfully and tried to gain time, but plainly they had no mind to assent except on compulsion, and upon this point the parties were at arm's length.

For many years it has been accepted practice in cases in the Commercial List to hear and determine claims for a declaration of right, when a real and not a fictitious or academic question is involved and is in being between two parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages, when at last the matter is brought before the Court. I believe this practice, as hitherto applied, to be warranted by the rules, and that the decision of the Court of Appeal to that effect in the *Guaranty Trust Case* (1) was correct. I do not question that those who were concerned in endorsing this writ and in issuing it out of the King's Bench Division and asking for transfer of the cause to the Commercial List as one proper to be transferred, acted in the belief that this course was correct, though to avoid awkward questions they avoided calling it a redemption action. For all that I am sure that what was done was wrong. The cause should have gone to the Chancery Division at the outset. It is, however, no easy matter to ensure this. The judge who takes the Commercial List cannot be expected, in the press of dealing with business which in other cases would go to a Master in Chambers, to scrutinize with distrust an application which both sides concur in treating as proper, and although we were informed that in this case the gentleman who attended the summons on the defendants' behalf pointed out that the case was not one for transfer and may even have done so with insistence, the issue was certainly commercial in its nature and I can quite understand that the claim might pass muster; indeed, the spirit of the maxim boni est judicis ampliare jurisdictionem has not been unknown in dealing with these summonses to transfer.

(1) [1915] 2 K. B. 536.

In any case, even after transfer, it would be possible on further information and after the close of the pleadings to discharge the order for transfer and either direct steps to be taken to remove the case to the proper division or to stay it. The plaintiffs were at risk as to costs and it was the defendants' affair, either by immediate appeal against the order to transfer or at a subsequent stage by a substantive application, to take this course. If they failed to do so, they laid themselves open to the charge of taking their chance of succeeding on the issue at the trial and of thus depriving themselves of the right to take the objection in any higher court. It does not seem to me that before Roche J. much was really made of the fact that the action was a redemption action. From his judgment it would seem that he understood the objection to have been in the first place to the making of any declaration under the circumstances, and in the second to the grant of an injunction in any case. At any rate the defendants took their chance of winning before him and they won.

My Lords, for my own part, I think that, as a matter of discretion, it would have been better if no declaration of right had been made. I am far from saying there was no jurisdiction to do it, but practice is practice, and if the trial of this preliminary question in the Commercial List was in itself desirable, it was for a judge of the Chancery Division, if he thought fit to do so, to direct an application to be made to the judge of the King's Bench Division in charge of the Commercial List to hear and determine as a preliminary commercial question, if he in turn thought fit to do so, the issue whether this was a rouble or a sterling loan. This is not a mere question of etiquette; it is the only way of complying with the Act. I know that it seems roundabout and would have cost the parties sundry six and eightpences, but that is a small matter. Practitioners who know their business will always be able to keep down expense, and short cuts are always perilous. As a matter of fact, the hearing of preliminary questions generally decides nothing, and they have to stand over till the trial. As it is, an action has been

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Lord Sumner.

begun in the Chancery Division in the long run, which ought to have been brought there in the first instance. The declaration in effect was sought to enable the plaintiff bank to ascertain whether, by a mere tender of roubles, they could save costs in the redemption action, and I am sorry that they got any assistance in the matter.

There are two questions of discretion involved—namely, whether any declaration should have been made under the circumstances and whether any amendment of the pleadings should have been allowed. Both Courts below have elected to make declarations and in each case, though in the alternative, the defendants sought a declaration in their favour. Further, the Court of Appeal has allowed the necessary amendment. As to the first point, if your Lordships were to dismiss the action on the ground that no declaration either way should be made, what will be the result? The Chancery action will proceed and, as I know no power that your Lordships have to direct that the judge who tries another action shall pay no attention to judgments which your Lordships may think should not have been given in this action, it is fairly certain that that learned judge will read them all, and that, as one party or the other will certainly be dissatisfied, whichever lead he follows, the case will presently come here again after a good deal more money has been spent. I cannot bring myself to advise your Lordships to refuse to decide the preliminary issue on this ground. It is true that in the result your Lordships' freedom is clogged by errors which occurred below, but this is always liable to happen in cases where a discretionary jurisdiction is exercisable in the Court of First Instance. Here only one of two answers is possible. If the case were such that the judgments given could be pronounced wrong in any event and so got rid of and the issue be freely raised in a new proceeding a different course might be taken. Then is there any ground for saying that the defendants were seriously surprised and taken at a disadvantage by the plaintiffs' abandonment of their pleaded case or any likelihood that further evidence will be forthcoming which ought to be heard? As the transaction is

mainly on letters and telegrams, the whole of which were in counsel's possession and apparently were brought to the attention of Roche J., the contention that the contract was not limited to the two letters pleaded cannot have surprised any one, nor could the new mode of stating the contract have required more than an attentive re-perusal of a few documents. An amendment ought to have been asked for at the trial, but to allow it on appeal is a common exercise of discretion which, little as I like it, I cannot say is wrong, and of course the Court must have satisfied itself that in doing so no injustice was done to the defendants.

As to the second matter, I can see no reasonable prospect that any fresh relevant evidence will be forthcoming hereafter so far as this issue is concerned. The defendants entirely failed to suggest what it would be or who would give it; nor should it be forgotten that this was a short-term loan and doubtless would have been cleared off within a few months but for the fact that the German occupation of Brussels put it out of the appellants' power to redeliver the security. This was the beginning and for a considerable time was the whole of the difficulty. At least the lenders should then have prepared themselves to deal with any question arising upon redemption, when that should become practicable, and, if they have failed to do so, they are not entitled to further indulgence or delay. In 1915 and 1916 the Russian office was, in fact, conferring about redemption with a representative of the borrowers, Mr. Wincey, and it was Mr. Friedland, the officer who signs one of the 1914 letters, who represented the lenders on those occasions. Was no information then given to the London branch for purposes of record? The plaintiffs' evidence at the trial in 1919 shows that Mr. Kôn, who negotiated the transaction in 1914, was then believed to be in Paris. The defendants did not question this. Their cross-examination of the plaintiffs' witnesses shows that they had considerable familiarity with the calculations by which the amount of the plaintiffs' requirements was originally fixed. In any case, the Court of Appeal could and would have given relief,

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Lord Sumner.

if a case of surprise had been made out before them. On the other hand, though counsel is instructed to say that the lenders' London branch knows nothing about the transaction beyond these letters and documents, no evidence was called on their behalf to found this statement. Before we can be asked to act on it I think some one should have been called to say what inquiries have been made and where the persons who would naturally know the facts now are, and what further evidence it is suggested that further time might make available. The matter cannot be one within the personal knowledge of the solicitors instructing counsel. My Lords, my conclusion is that, as it cannot be said that this is an action over which the High Court had no jurisdiction, or that the relief sought is relief which the High Court could not give, or that the plaintiffs had no cause of action at all, and as the appellants have participated in and at first have profited by the irregularities which have occurred, we cannot at their instance simply dismiss the action. No useful purpose would be served by setting aside all proceedings subsequent to appearance beyond the expression of a costly censure, which can equally well be expressed otherwise, and as this course would cause much expense and delay, I think we ought finally to deal with this issue, which has been sufficiently contested already. For the reasons given by Atkin L.J. I think that the loan was a rouble loan, but, as some of your lordships think otherwise, I will more fully state my reasons. [His Lordship then stated his reasons for that opinion and advised that the appeal should be dismissed but without costs.]

LORD PARMOOR. My Lords, the respondents were plaintiffs in an action against the appellants asking (inter alia) for a declaration that they are entitled to the possession of 60,000*l.* Chinese Government 5 per cent. Gold Bonds and 30,000*l.* City of Baku 5 per cent. Bonds upon payment to the appellants at their London Branch of 750,000 roubles or the equivalent thereof in British currency. The action was brought in the King's Bench Division, and transferred to the Commercial

List under an Order made by Bailhache J. on November 19, 1919. It does not appear that at this stage any objection was taken either to the commencement of an action of this character in the King's Bench Division, or to its transfer to the Commercial List. Points of claim and points of defence were duly delivered, and the case came on for trial before Roche J. The main question in issue between the parties was whether the loan was a rouble loan, repayable in roubles, or a sterling loan, repayable in sterling. Roche J. decided against the respondents that the loan was a sterling loan repayable in sterling, and dismissed the action, entering judgment for the appellants. Although it was not material to his decision, he expressed his opinion that there was a great deal in the contention of the appellants, that the declaration asked for ought not to be made, on the ground that the relief asked for was really ancillary to, or in lieu of, the relief which would be granted to a mortgagee of securities in a redemption action. I think the matter is one of discretion and not of jurisdiction, and that there is no reason for saying that the discretion has been improperly exercised. It would certainly have been within the discretion of Roche J. to have dismissed the action on this ground, without expressing any opinion on the merits.

The respondents appealed to the Court of Appeal. The Court of Appeal granted an amendment, reversed the decision of Roche J. on the merits, and declared that the loan made by the appellants to the respondents was a rouble loan repayable in roubles, and not a sterling loan. I think that the amendment was properly allowed, but the Court were unanimously of opinion that it was not possible for the Commercial Court to grant the relief asked for in the action, and therefore refused to do more than grant a declaration. The view of the Court was that by granting the declaration the Court could afford considerable relief to the parties, and that it would be open to the respondents by other proceedings, such as they might be advised to take, to obtain the necessary relief with a view to obtaining possession of their securities.

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Lord Parmoor.

The result is that a declaration adverse to the appellants has been made by the Court of Appeal. Against this decision the appellants have appealed to this House. They are in my opinion entitled to a reversal of the order which contains the declaration, if they can show that on the merits the decision of the Court of Appeal should be set aside and the judgment of Roche J. restored. [His Lordship then discussed the case on the merits and was of opinion that the Court of Appeal was right in declaring that the loan was a rouble loan repayable in roubles and not a sterling loan. He agreed in the motion proposed by Lord Dunedin.]

LORD WRENBURY. My Lords, we have here before the House a mortgagor who has brought his mortgagee into Court claiming a declaration as to the amount due in respect of the mortgage, and a declaration that he is entitled to the mortgaged property on payment of that amount, but making no offer to redeem. He has obtained a declaration as to the amount due in respect of the mortgage. He did not bring his action in the Chancery Division. Had he done so and had he managed to get his action into Court for trial, his counsel in opening must in the first five minutes have disclosed that the position is such as stated in the initial sentence of this judgment. He would have had short shrift. The judge would at once have asked whether he would then and there amend his pleading by adding an offer to redeem, and upon his refusing to do so would have dismissed his action with costs. If on the other hand he had assented to add an offer to redeem, the mortgagee would have been assured his right to have sale or foreclosure if the amount due for redemption were not paid. But he brought his action in the King's Bench Division. It was tried in the Commercial Court. The plaintiff there obtained a declaration but not the declaration he wanted, so he brought no action to redeem. He appealed. The Court of Appeal reversed the trial judge and gave him a declaration in his favour, the declaration he wanted. Thereupon he brought an action to redeem. That

action is pending. Meanwhile the mortgagee has appealed to this House.

The first question, and that which as regards its general importance is to my mind far the most important question in the case, is whether the action ought ever to have been entertained at all, whether it ought not to have been dismissed, and whether your Lordships ought not now to dismiss it and to refuse to determine in this action what is the amount on payment of which the plaintiff the mortgagor can redeem. My judgment is that the action ought to be dismissed, and I offer no apology to your Lordships for giving my reasons for that opinion at length. Before doing so it will be convenient to outline the facts of which the result only is indicated above. In June, 1914, the appellants, the mortgagees, advanced to the respondents, the mortgagors, a sum of 77,000*l.* odd upon the security of certain Baku bonds and Chinese bonds. One of the parties is a Russian bank. The loan was made in Petrograd. A very serious question has arisen between the parties whether the loan is repayable in sterling or in roubles. If the latter the mortgagor can redeem on payment of about say 5000*l.* If the former he must pay 77,000*l.* In the action brought in the King's Bench Division, the mortgagor claimed a declaration that he was entitled to the possession of the mortgaged bonds upon payment of roubles, and an injunction to restrain the mortgagees from parting or dealing with the bonds. It seems that in the course of the proceedings the mortgagor moved for an injunction to restrain the mortgagees from collecting the money due on the coupons of the bonds. It is no matter for surprise that he failed. His ideas as to the relative rights of mortgagor and mortgagee seem to be unique. With this exception we have heard nothing of the claim for an injunction. Some propositions require no argument, and may be stated as obvious. The rights of mortgagor and mortgagee are different at law, and in equity. At law the mortgagee is the owner of the mortgaged property. In equity his right in that respect is subject to the equity of redemption, but he has the benefit of sale or foreclosure if the mortgagor fails

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Lord Wrenbury.

to redeem. Any cause of action as between mortgagor and mortgagee arises solely upon the mortgage contract. In equity the mortgagor can reach the mortgaged property but only by enforcing the equity of redemption. If he sues he must offer to redeem, and if having done so he fails to redeem he will be exposed to sale or foreclosure. A redemption action is assigned business. It can be brought only in the Chancery Division. This being so, the mortgagor has in this case sued not in the Chancery Division but in the King's Bench Division. He is in the wrong Court, and the Court of Appeal has rightly held that he is in the wrong Court. He cannot, even if he offered it, have redemption in that Court, and cannot be exposed to sale or foreclosure in that Court. But nevertheless that Court has made a declaration as to the mortgagor's liability which will bind the mortgagees when an action is brought as it has since been brought in the right Court.

First, was there jurisdiction to entertain this action at all? I think there was, and for two reasons. The one is that the High Court of Justice is after all one Court although divided into Divisions and with certain business assigned to one Division to the exclusion of another. When this writ was issued it was issued in the High Court of Justice, and if it was issued in the wrong Division the proper course was not to dismiss it but to transfer it to the right Division, where it could have been prosecuted if the plaintiff offered to redeem. The second is that there is jurisdiction in the Court to determine the construction of any document, although I have no doubt at all that there are cases in which the Court would without hesitation refuse to exercise the jurisdiction. Suppose there were documents comprising a correspondence between a man and a girl, and an action were brought for a declaration that upon their construction there was or was not a promise of marriage with a view to bringing or not bringing an action for breach of promise of marriage according to the result. It may be that there would be jurisdiction in that case, but I can have no doubt at all as to the fate of such an action. Assuming that there was jurisdiction in the King's Bench

Division to entertain this action, the next question is whether Order xxv., r. 5, applies, and if it does how the Court ought to have acted in applying the rule. It may be, and I think it is the case, that to call Order xxv., r. 5, into operation nothing more is essential than that "an action or other proceeding" shall be competent to the plaintiff and shall have been brought. I doubt however whether it applies when the action brought is not a competent action duly instituted in the proper Court but an action brought in the wrong Court to evade the consequences which would ensue to the plaintiff for the benefit of the defendant if it were brought in the right Court. The duty of the primary judge when this action was brought before him was I think to refuse to entertain it at all unless the plaintiff amended his pleading by adding an offer to redeem, and then to have transferred the action to the Court which alone could exercise the jurisdiction of the High Court in that class of action. By not taking this course he was depriving the defendant of his right as mortgagee to have in that action sale or foreclosure if the plaintiff failed to redeem. Upon this ground I incline to the opinion that Order xxv., r. 5, does not apply at all. Next, assuming that it does apply, the authorities are numerous that the discretion of the Court to make a declaration "whether any consequential relief is or could be claimed or not" is to be most carefully and jealously exercised. The present case is so extreme that if the discretion is to be exercised in favour of entertaining an action for a declaration without relief in this case, I cannot at the moment picture any state of facts in which the Court might not exercise its discretion in that direction—for it is here exercising its discretion with the result that the mortgagor gets a decision upon the point on which he desires it without exposing himself by an offer to redeem to the consequences of sale or foreclosure if the declaration should be against his interests. And he seeks and has here sought successfully to put himself in a position to redeem or not to redeem according as the construction is for him or against him. Even upon the low ground of costs he has no right to bring his

H. L. (E.) 1921 — RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD. — Lord Wrenbury.

mortgagee into Court and expose him to the defence of an action in which, even if the mortgagor is ordered (as in my opinion he certainly ought to be) to pay in any event all the costs of the action, the mortgagee will not be fully reimbursed.

My Lords, as far as I can see, the principles upon which I have been insisting have been very imperfectly understood in the conduct of this case. If the mortgagee had adequately presented them to the attention of the Court I should have expected to have traced the result more clearly in the judgments delivered. It is plain that something was argued upon it, but the trial judge, Roche J., deals with it only by this sentence in his judgment: "It is said on behalf of the Defendants that at all events this Declaration that is asked for ought not to be made, and the injunction which is asked for ought not to be granted, because if it is a rouble loan, contrary to my decision, then the Plaintiffs are not able to repay the persons who have made it in the currency of the country, or at the place where the payment ought to be made. Therefore, this relief that is asked for, that is really ancillary to or in relief of the relief which would be granted to a mortgagee of securities in a redemption action, ought not to be granted, and I think there is a great deal in that contention." The ground which he assigns—namely "because if it is a rouble loan, &c." shows that he was not appreciating the real point. In the Court of Appeal Scrutton L.J. appreciated its importance up to a certain point, but I cannot think that he had obtained from counsel in argument an adequate explanation of the rights of the mortgagee in the matter, particularly as regards sale or foreclosure, and of the consequences of the course which the Court was taking. When Bankes L.J. affirmed that "the remedy which the Plaintiffs sought was quite inappropriate," that the plaintiffs' real claim was to redeem, and the proper place to decide that was the Court of Chancery, he seems to be quite unconscious that upon those statements, which were quite accurate, he ought to have gone on to say that the Court would not allow him to evade making the offer to redeem which the Court of Chancery would have

required as a condition precedent to listening to him at all and the right of sale or foreclosure which would have ensued. The concluding paragraph of Atkin L.J.'s judgment is this: "Having decided that I entirely agree that it really was not possible for the Commercial Court to grant the relief asked for in this action, I think there are many matters to be determined that would be much better determined, and, indeed, can only be properly determined according to the rules of the Chancery Division, and to my mind, the right view is merely to make this declaration, which does, I think, afford considerable relief to the parties, in the sense that it sets at rest, at present at any rate, the important question in difference between them, and, having determined that, it would be open to the Plaintiffs by other proceedings, such as they may be advised, to obtain the necessary relief with a view to obtaining possession of their securities." I cannot trace in this that the point I have been discussing was present to his mind.

My Lords, I have felt my responsibility in this case to be the greater because not one of the four judges before whom this case has come below is a judge who has been trained in Courts of Equity, and (a fact which is to myself the keenest matter of regret) no one of your Lordships with whom I am privileged to sit in deciding this case has been so trained either. Under these circumstances, I feel my voice to be indeed a voice crying in the wilderness, but I have felt bound to cry even though I cry in vain. I am, indeed, in the present case in a worse plight than I was in the full Court of Appeal in the *Continental Tyre Case* (1), for, although I there found myself standing alone, there was in that case (being in the Court of Appeal) an opportunity (and it was utilised) of putting the matter right in your Lordships' House. (2) But from the decision of this House there is no appeal, nor even opportunity for reconsideration even by the House itself.

My Lords, so far I have not even touched upon that which is to the parties the really important point—namely, whether

(1) [1915] 1 K. B. 893. (2) [1916] 2 A. C. 307.

H. L. (E.) 1921

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LD.

Lord Wrenbury.

this is a loan repayable in sterling or a loan repayable in roubles. And I do not intend to say anything whatever upon that point. If I did, I should be doing the very thing which, as I think, the Court below had no business to do. Had Your Lordships been divided two and two upon that point I might have been compelled to do violence to my own convictions and to have expressed an opinion upon it. But as a majority of your Lordships think it to be a rouble loan it is immaterial whether I agree in that view or not. I ought, I think, to add (although under the circumstances it is not a matter of moment) that I am far from satisfied with the course taken in the Court of Appeal in giving leave to amend. The plaintiffs' case down to reply in the Court of Appeal was rested upon two documents and two documents only—namely, those of June 1 and 3. In reply in the Court of Appeal they asked for and obtained leave to amend by introducing on the question of construction several other subsequent documents, and it was upon those subsequent documents that they succeeded. It may be, and I think it is the fact that the defendants might then have asked that the further hearing should stand over and that they should be allowed to call further evidence in the Court of Appeal. But I do not think the plaintiffs can be allowed to treat that which was done as a fair trial of this new case. It would have been only right and just I think that the Court itself should have allowed the amendment only upon the condition that the defendants should have an opportunity of advancing further evidence if they desired to do so. The action and the proceedings in the action are, to my mind, alike unsatisfactory. I am, however, satisfied to rest my judgment in this case upon the ground which I have discussed at length. In my opinion the action, in the absence of an offer to redeem, ought never to have been entertained. It ought, I think, to have been dismissed with costs at the outset. It ought, I think, to be dismissed now and the mortgagees ought to have their costs throughout the proceedings. It is scarcely necessary to add that the matter cannot be set right by the plaintiffs now making (if they are minded so to do) an offer to redeem,

for in the Division in which this action is found, there is no power to make the order proper in a redemption action.

Order of the Court of Appeal affirmed, and appeal dismissed. Each party to bear and pay their own costs of the appeal to this House.

Lords' Journals, July 1, 1921.

Solicitors for the appellants : *Freshfields & Leese.*
Solicitors for the respondents : *Roney & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *July* 28.

RAINHAM CHEMICAL WORKS, LIMITED (IN LIQUIDATION), AND OTHERS } APPELLANTS ;

AND

BELVEDERE FISH GUANO COMPANY, LIMITED . . . . . } RESPONDENTS.

Nuisance—Negligence—Dangerous Trade—Manufacture of High Explosives—Explosion—Non-natural User of Land—Liability of Manufacturer—Liability of Occupier.

In August, 1915, F. and P., who were interested in a novel process for making picric acid, a high explosive, from dinitrophenol (D.N.P.), entered into an agreement with the Minister of Munitions to manufacture for him picric acid at Rainham, Essex. The contractors as agents for the Minister were to erect works for the purpose, the buildings, plant and machinery to be paid for by the Minister and to remain his property. The Minister was to deliver D.N.P. to the contractors, who were on their sole responsibility, and at their risk, to convert it into picric acid at an agreed price. In September, 1915, F. and P. entered into an agreement for the tenancy of the land on which the factory was to be established and thereby covenanted not to assign or underlet or part with the possession of the premises without the previous consent of the landlords except to a Government Department. In March, 1916, a private company formed by F. and P. for the purpose of acquiring and carrying on the undertaking, entered into agreements with F. and P. for the

* *Present :* LORD BUCKMASTER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

H. L. (E.)
1921
RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO.

sale to the company, first, of the rights of the vendors under their agreement with the Minister of Munitions, and secondly of the benefit of the tenancy agreement and of the buildings erected by the vendors, completion to take place on payment of the consideration (which was never paid). The vendors also agreed to allow the company to go into and remain in occupation of the premises as tenants until the purchase consideration had been paid, but until payment the company were to be deemed to be in possession of the premises, machinery and plant as agents for the vendors. F. & P. never obtained the consent of the landlords under the tenancy agreement to the assignment or parting with possession of the premises. The company carried on the manufacture of explosives on the premises and large quantities of D.N.P. were delivered at the factory by the Minister and were stored there close to other inflammable materials, and as a result an explosion occurred which caused damage to neighbouring property. In an action for damages by the owners against the company and F. and P. :—

Held, (1.) that the company were liable on the principle of *Fletcher* v. *Rylands* (1866) L. R. 1 Ex. 265 ; (1868) L. R. 3 H. L. 330 for the damage caused by storing dangerous substances on land of which they were in actual physical possession ; (2.) that F. and P. had not effectively divested themselves of the occupation which they held under the tenancy agreement, and that they also were liable on the same principle as occupiers.

Decision of the Court of Appeal [1920] 2 K. B. 487 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Scrutton L.J.

The action was brought by the respondents against the appellants the Rainham Chemical Works, Ld., and two of its directors, Feldman and Partridge, for damages caused to the respondents' property by an explosion which occurred at the Rainham Chemical Works of a large quantity of dinitrophenol which was stored at the works for the purpose of manufacturing picric acid.

The facts are fully stated in the report of the case before the Court of Appeal and also in the judgment of Lord Buckmaster.

Scrutton L.J., before whom the case was tried without a jury, ordered judgment to be entered for the respondents against all the appellants with costs and referred the question of damages to an Official Referee, and his judgment was affirmed by the Court of Appeal. As against the company the Court (Lord Sterndale M.R., Atkin L.J. and Younger L.J.)

(1) [1920] 2 K. B. 487.

were unanimous in holding that liability was established on the principle of *Fletcher* v. *Rylands* (1), and the Master of the Rolls and Atkin L.J., Younger L.J. dissenting, were further of opinion that Feldman and Partridge were liable on the same principle.

1921. June 10, 13, 17, 20. *Sir John Simon K.C.* and *Montgomery K.C.* (with them *Maddocks* and *Wetton*) for the appellants. The doctrine of *Fletcher* v. *Rylands* (1) does not apply where, as here, the manufacture of explosives is carried on under the direction of the Ministry of Munitions under the Regulations for the Defence of the Realm for the general benefit of the community at a time of grave national danger. Granted that in normal times the deposit of dangerous explosives would be a non-natural user of the land, in the special circumstances of this case it ought not to be so treated; and the liability arises only in the case of a non-natural user: *Madras Ry. Co.* v. *Zemindar of Carvatenagaram.* (2) Assuming that *Fletcher* v. *Rylands* (1) applies the real question is, who was in active control of the business at the time of the explosion? In the appellants' submission it was the company. The company was in occupation and the company manufactured the explosives, and on the facts there is no ground for saying that the company was acting as the agent of Feldman and Partridge. It is a strange perversion of the relationship existing between a company and its directors to say that the company is acting as the agent of its directors, and the actual form of the contractual documents is opposed to this view. The transfer to the company of the rights of Feldman and Partridge under their arrangement with the Ministry was effected with the knowledge and assent of the Ministry, whose only real interest was to get the explosives manufactured as expeditiously as possible. Although Feldman and Partridge might still remain liable to the Ministry under their original arrangement it does not follow that in an action of tort by a third party the plaintiff is

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(2) (1874) L. R. 1 Ind. App. 364.

H. L. (E.) 1921 — RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO.

entitled to apply to them the doctrine of respondeat superior and hold them liable for somebody else's tort: *Rickards* v. *Lothian*. (1)

J. B. Matthews K.C. and *H. H. Joy* for the respondents. True it is that a company, even a one-man company, is a separate entity, and this is an important factor in dealing with questions of contract and property, but wholly different considerations apply to cases of crime and tort. If a company collects and stores dangerous matter on its premises surely those who have control of the company as its governing directors are jointly responsible with the company for any injury caused to a third party by the dangerous matter. The question is, who has the control of the noxious thing? *Rickards* v. *Lothian* (1); *Box* v. *Jubb*. (2) Feldman and Partridge were carrying on a dangerous trade for their own benefit and they cannot limit their liability for any injury caused thereby to their neighbours by turning themselves into a limited company. To establish liability on the *Fletcher* v. *Rylands* (3) principle knowledge of the dangerous character of the substance is not essential: *West* v. *Bristol Tramways Co.* (4) The accumulation of an explosive substance on one's land may be in itself unlawful as being a public nuisance before any explosion occurs: *Reg.* v. *Lister* (5); *Crowder* v. *Tinkler* (6); *Hepburn* v. *Lordan*. (7) Where persons carry on an inherently dangerous business and transfer it to a company over which they have the actual control and permit the company to carry on the business in such a way as to render it liable for tort they are themselves jointly liable with the company: *Betts* v. *De Vitre*. (8) Feldman and Partridge, as having complete control of the company, are liable both on the principle of *Fletcher* v. *Rylands* (3) and on the ground of negligence: *Musgrove* v. *Pandelis* (9); *Miles* v. *Forest Rock Granite Co.*

(1) [1913] A. C. 263, 278–9.
(2) (1879) 4 Ex. D. 76, 78–9.
(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(4) [1908] 2 K. B. 14.
(5) (1857) Dears. & B. 209.
(6) (1816) 19 Ves. 617, 621.
(7) (1865) 2 H. & M. 345, 351.
(8) (1868) L. R. 3 Ch. 429, 442.
(9) [1919] 1 K. B. 314; [1919] 2 K. B. 43.

(*Leicestershire*) (1); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (2) The question of liability turns not on occupation but on control. Assume that the company is in occupation as the lessee or licensee of Feldman and Partridge, nevertheless, if Feldman and Partridge have leased or licensed the premises to the company for the purpose of its continuing the conduct of an inherently dangerous business, they are liable. The landlord escapes only if he has not authorized and does not profit by the continuance of the nuisance: *Roswell* v. *Prior* (3); *Rich* v. *Basterfield* (4); *Brown* v. *Bussell* (5); *White* v. *Jameson* (6); *Harris* v. *James.* (7) [*Sir John Simon K.C.* referred to *Pwllbach Colliery Co.* v. *Woodman.* (8)] The contractor cases lead to the same result. A man who employs a contractor is not liable for casual negligence on the part of the contractor, but where the work to be done is from its nature likely to cause danger to others it is his duty to take all reasonable precautions, and he does not escape from liability for the discharge of that duty by employing a contractor if the latter does not take these precautions: *Penny* v. *Wimbledon Urban Council.* (9) On the question who was in occupation of the premises it is submitted that Feldman and Partridge were. There was a prohibition in the tenancy agreement against assigning the land held by Feldman and Partridge without the landlords' consent, which was never given, and there was a similar prohibition against assigning the agreement with the Ministry. The presumption is against breaking these prohibitions, as the breach might entail the forfeiture of the whole concern. Further, this particular process of manufacture required both a factory licence and a store licence under the Explosives Act, 1875, ss. 6, 15, 18, 97. Feldman and Partridge were the licensees under the Act and there is no evidence of any notice having been given of any change of occupation.

(1) (1918) 34 Times L. R. 500.
(2) [1914] 3 K. B. 772.
(3) (1702) 12 Mod. 635, 639.
(4) (1847) 4 C. B. 783, 801.
(5) (1868) L. R. 3 Q. B. 251, 261.
(6) (1874) L. R. 18 Eq. 303.
(7) (1876) 45 L. J. (Q. B.) 545.
(8) [1915] A. C. 634.
(9) [1899] 2 Q. B. 72, 78.

H. L. (E.)
1921
RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO.

Sir John Simon K.C. in reply. The cause of action did not arise because D.N.P. was deposited on the premises, but because of the failure of the occupier to guard D.N.P. from explosion. It was the juxtaposition of D.N.P. with the bags of nitrate of soda which caused the disaster. Permission by the landlord to use the premises for a purpose which may or may not involve a nuisance does not render the landlord liable if the tenant conducts the business in such a way as to create a nuisance: *Malzy* v. *Eichholz* (1), and this principle applies in judging liability under the *Fletcher* v. *Rylands* principle just as in any other tort. To contend that Feldman and Partridge are liable for the tort of the company because they are directors or governing directors of the company is an amazing proposition for which no authority can be found. The only persons who can be liable for a tort are (*a*) the actual tort-feasor and (*b*) the actual tort-feasor's employer, and the only plausible way of putting the respondents' case against Feldman and Partridge is to say that the relationship of employer and servant existed between them and the company; but the test of that is, Has the employer the right to intervene at any moment and do the thing himself, or say Do it in such and such a way? Feldman and Partridge assert no such right. [He also referred to *Stone* v. *Cartwright*. (2)]

The House took time for consideration.

1921. July 28. LORD BUCKMASTER. My Lords, on September 14, 1916, a violent explosion occurred at the Range Works, Rainham, in the county of Essex, causing loss of life and serious damage to adjoining property. Some of the premises so damaged were owned by the present respondents, the Belvedere Fish Guano Co., who accordingly instituted proceedings to recover compensation for their loss. They originally made as defendants to the action a limited company known as the Rainham Chemical Works, Ld., and sought to establish liability against them

(1) [1916] 2 K. B. 308, 315. (2) (1795) 6 T. R. 411.

upon the ground that they were in occupation of the works and had brought upon their land quantities of dangerous substances. The plaintiffs subsequently amended their writ, and added as further defendants Messrs. Feldman and Partridge, who, together with the company, are the present appellants, alleging that they, together with other persons and the defendant company, were in occupation of the land, or that the company was in occupation on their behalf. The answer put in was that the company were employed as servants or agents of the Ministry of Munitions, that there was no negligence, and that the materials which caused the explosion were not in themselves dangerous. There was no attempt to sever as between one set of defendants and the other; there was, in fact, no denial that the company occupied on behalf of the other defendants, and there were no steps taken to obtain separate representation at the hearing; the case therefore came on for trial with the main issue defined by the pleadings as being whether or no the work was done by the defendants or some of them as agents for the Ministry of Munitions or whether the acts in themselves were actionable.

Now, the foundation of the action was a claim based upon the familiar doctrine established by the case of *Fletcher* v. *Rylands* (1), which depends upon this—that even apart from negligence the use of land by one person in an exceptional manner that causes damage to another, and not necessarily an adjacent owner, is actionable: *West* v. *Bristol Tramways Co.* (2); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (3) In the present case the use complained of was that for the purpose of making munitions, which was certainly not the common and ordinary use of the land, two substances, namely, nitrate of soda and dinitrophenol, were stored in close proximity, with the result that on a fire breaking out they exploded with terrific violence. It may be accepted that it was not known to either of the defendants that this danger existed, but that in itself affords no excuse, and the

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(2) [1908] 2 K. B. 14.
(3) [1914] 3 K. B. 772.

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Buckmaster.

result is that the plaintiffs' cause of action is well founded and the only matter for determination is against whom the action should be brought.

Scrutton L.J., before whom the case was originally heard, regarded both sets of defendants as responsible and entered judgment against them accordingly. The Court of Appeal were unanimous in the view that the company was liable, but Younger L.J. dissented from his colleagues on the question of the liability of the two remaining defendants, whom he regarded as free from responsibility.

In order that the grounds of these decisions may be examined and compared, it is necessary to show the circumstances in which the premises were being used at the time of the accident. It appears that in 1915 the two appellants, Feldman and Partridge, became aware of a process, invented by two foreign chemists named David Maron and George Wyss, whereby picric acid could be manufactured from dinitrophenol and nitrate of soda. The then well-established method of manufacture involved the use of nitric acid, and, owing to the shortage of this substance, the new process appeared to be one of great national value. Messrs. Feldman and Partridge, together with one Oliver de Gerde, accordingly obtained the benefit of an agreement dated July 14, 1915, with Messrs. Maron and Wyss for the benefit of their services and the rights of patents and inventions held in connection with the process, and, armed with this agreement, they secured on August 24, 1915, from the Ministry of Munitions a contract whereby they were, at their sole risk and on their sole responsibility, to make into picric acid quantities of D.N.P. delivered to them by the Minister. They were to be paid 2*d.* a pound for their services and such further profits as they might make by the sale to the Minister of the picric acid at a price not exceeding 3*d.* a pound; for sale to Russia, Italy, and France they were to be at liberty to manufacture on their own account. There was an express provision that Messrs. Feldman and Partridge were to keep separate books of account, store books and other records for the purpose of recording all transactions relating to the agreement, and

the conditions of contracts for the supply of army stores were made applicable to the bargain, the most important of these conditions being one that prohibited the transferring or assigning, directly or indirectly, of any portion of the contract without the permission of the Department.

Messrs. Feldman and Partridge then obtained a tenancy agreement of the land on which the factory was to be established from J. C. and J. Field, Ld., and this they effected on September 10, 1915, the term being one year from September 1, 1915, and thenceforward until six months after the declaration of peace, with power of termination which is immaterial. In this agreement there was an express provision that the tenants were not to assign, underlet, or part with possession of the premises or any part thereof without the consent of the landlords, excepting to a Government Department. Messrs. Feldman and Partridge then executed the necessary work upon the premises. These they divided into two parts; one called the Range Works, where the picric acid was to be manufactured for the Government, and the other called the Rainham Works, for the manufacture of picric acid which they were at liberty to export. De Gerde, whose name has been mentioned, retired on September 23, 1915, from any active participation in the work, and no further reference need be made to him, though his name appears in all the agreements to which attention must be directed.

On March 17, 1916, the appellant company was incorporated with a share capital of 5000*l.*, divided into 100,000 shares of 1*s.* each, its object being to acquire and establish the business of manufacturers of picric acid and explosives and other general businesses, and by its articles it was provided that they should adopt and carry out two agreements therein referred to. Articles 12, 13, and 14 established the appellants, Messrs. Feldman and Partridge, as the sole governing directors of the company, without remuneration, and vested in them "full control of the business of the company," including power to appoint or remove directors, but there is nothing to show whether this power was ever exercised. The

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Buckmaster.

agreements mentioned in the articles were duly executed on March 22, 1916, and were made in the one instance between Messrs. Feldman and Partridge and the company (and this agreement I will refer to as "the first agreement"), and the other between Messrs. Maron and Wyss, Bertrand, de Gerde and Feldman and Partridge of the one part and the company of the other part (which I will call "the second agreement").

The first agreement provided for the sale to the company of the benefit of the tenancy agreement and the buildings erected by the vendors, the consideration being a sum of cash calculated in a manner which it is unnecessary to examine. Completion was to take place when the amount in cash had been ascertained and paid, and this apparently was never done. The vendors agreed to provide capital for all materials and expenses until such time as the company was in a position to commence the manufacture of picric acid commercially. They also agreed to allow the company to go into occupation of the premises and remain in such occupation as tenants until the purchase consideration had been paid, but until payment it was expressly stated that the company should be deemed to be in possession of the premises, machinery and plant as the agents of the vendors.

The second agreement recited that the company had been formed for the purpose of defining in shares the respective interests of the different parties and provides for the sale to the company of the rights acquired under the agreement of July 14, 1915, and August 24, 1915, the consideration for the sale being 5000*l.* payable as to 2*s.* in cash and the balance by the allotment of fully-paid shares to the different parties in the proportions specified in the schedule.

What subsequently happened has never been clearly established. The company undoubtedly made agreements for the appointment of a manager and other servants, they effected assurances of the property in their own name, they appear also to have been placed as occupiers of the premises on the rate book, and they entered directly into communication with the Ministry of Munitions, but it is quite clear that the Ministry of Munitions never accepted their liability in

place of Messrs. Feldman and Partridge, or gave any assent whatever to the assignment of the contract. As to what books were kept by the company, what the directors did, or what was the nature or the position of their banking account no information has been afforded. It may, however, I think be accepted that in some sense the company was in occupation, and it is said on behalf of Messrs. Feldman and Partridge that the circumstances I have mentioned are sufficient to show that that occupation was exclusive and independent, and that the company, in fact, carried on the business entirely on their own account and were therefore alone responsible for what ensued.

Scrutton L.J., in trying the case, rejected this argument upon the ground that the agreements were paper shams and made no difference to the reality. I cannot accept that view; the agreements were real agreements, entered into with an independent entity, and were not shams. It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully-paid shares and no free capital for working suggest that the company is nothing but an alter ego for the people by whose hand it has been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence. In the case of *Salomon* v. *Salomon & Co.* (1) parties who sought to disregard the existence of the company on these grounds were unable to establish this fact, and they accordingly failed, but the respondents urge that here the position is quite plain. It

(1) [1897] A. C. 22.

H. L. (E.) 1921 — RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. — Lord Buckmaster.

seems to have been so regarded by Scrutton L.J. The Master of the Rolls thought the same result was reached by considering that the company was in fact under the sole control of Messrs. Feldman and Partridge as governing directors, and Atkin L.J. by the analogy of cases such as *Penny* v. *Wimbledon Urban District Council.* (1)

I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads. Nor is this a case where danger must necessarily have arisen within the principle of such authorities as that of *Harris* v. *James.* (2)

The grounds of Atkin L.J.'s judgment give rise to a different problem, which is not resolved by the case of *Penny* v. *Wimbledon Urban District Council* (1), to which he refers.

There a local authority had, in pursuance of their powers, taken upon themselves the duty of making up a road. They entered into a contract for the work with an independent contractor. He left heaps of soil upon the road, unfenced and unlighted, and the plaintiff suffered injury by falling over them. The ground of the decision was that the Council had control of the work, and were consequently liable for the negligent act of their contractor, and, as A. L. Smith L.J. says (3), "the position, then, is that the Council are found to be liable as principals for the negligence of their agent." The substance of Vaughan Williams L.J.'s judgment is expressed in these words: "In cases like the present, where a statutory authority has power to do something to a road which involves stopping it, or to do something to it which will

(1) [1899] 2 Q. B. 72. (2) 45 L. J. (Q. B.) 545.
(3) [1899] 2 Q. B. 75, 77.

make it dangerous while it is being done, there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done," and that duty being once established they cannot escape from it by the mere employment of an independent contractor. The case, therefore, depends either upon the principle that the local authority controlled the work as principals or that they had a duty to perform which they neglected. The first of these grounds is in issue in the present case; and as to the second, the mere fact of entering into a contract to make munitions does not, in my opinion, impose any general duty on the contractors.

The circumstances in which a contractor is liable for a sub-contractor's act may not be capable of a definition which can be applied to test every variety of circumstance, but I do not think any circumstances establishing liability under this head are proved to exist in the present case.

Having contracted for the manufacture of munitions, which in itself involves the possibility of explosion, it does not appear to me that liability could not be displaced by the introduction of an independent contractor. If, for example, there had been no restriction placed upon Messrs. Feldman and Partridge's power to assign or enter into sub-contracts, and they had contracted with a well-known firm of munition makers to execute the order in whole or in part upon their premises, it would, I think, be difficult to say that an explosion that took place upon those works would be an explosion for which Messrs. Feldman and Partridge would have been responsible, and, for the purpose of testing liability, it does not appear to me that the restriction to which they were subject is a relevant matter. This, I think, is accurately expressed by Younger L.J. in his judgment, but I do not share the conclusions at which he arrives, because, in my opinion, the liability depends upon other considerations.

It depends upon the foundation of the suit which charges the defendants as occupiers of the land. Were Messrs. Feldman and Partridge in occupation? That they were so originally is, of course, beyond dispute. They were the tenants

H. L. (E.) 1921 — RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. — Lord Buckmaster.

from Messrs. Field, and as such tenants they entered on the premises and there proceeded to effect alterations and do the necessary work. They also employed Mr. Pettit, under whose superintendence the work was continued, and though he continued his services after the formation of the company they were sued by him for his fees and paid his bill for the whole period of his work. Not only were they originally in occupation but they were prevented by the very terms of their contract not merely from assigning or underletting but from parting with the possession of the premises themselves. What then was the character of the occupation by the company? It is, I think, to be found defined in the language of the first agreement by which they sold their rights to the company. They were there as agents for the vendors, and unless Messrs. Feldman and Partridge were able either to establish that position or to show that they had never in fact parted with possession at all they would have forfeited the lease and been unable either to obtain any relief against the forfeiture or any compensation for the work they had done. It was essential in relation to their landlords that they should not give up possession of the property. The landlords had themselves thought that the property had been dealt with and had received an express assurance on behalf of Messrs. Feldman and Partridge that it had not in fact been assigned or underlet. Permission to assign was asked for, but was never granted.

In these circumstances I cannot satisfy myself that Messrs. Feldman and Partridge ever so divested themselves of occupation of the property, which they undoubtedly held, as to substitute the occupation of the company in the place of their own. I should have come to that conclusion apart from the position which the history of the action discloses, but I find confirmation of it in the fact that when the claim was first brought against them, a claim of the greatest magnitude and, I fear, of the gravest consequence, they never attempted to dissociate themselves from the company nor to assert that they were not in occupation though it was specifically alleged; neither by pleading nor by separate

representation did they sever in their case, though indeed it was done in argument both here and in the Courts below, where counsel have been called upon to perform the impossible feat of appearing for two clients who, according to their contention, possess divers and conflicting interests.

For these reasons I think this appeal should be dismissed.

LORD SUMNER. My Lords, when stored in large quantities dinitrophenol is a dangerous explosive. A hot flame is needed to explode it, but this is provided by the ignition of substances which, like nitrate of soda, give off large quantities of oxygen.

The Rainham Chemical Works, Ld., by the hands of its employees, for whom it is responsible as their employer, brought into the Range site at Rainham dinitrophenol in large quantities, the Range site being one from which opportunities of ignition as above mentioned are not excluded. The explosive, to which in this case the rule in *Rylands* v. *Fletcher* (1) has to be applied, is not a combination of dinitrophenol with old boxes or bags, which had contained nitrate of soda. These are only one of the conditions of explosion. What is material is the explosive itself. The dinitrophenol was lawfully brought on to the Range site and stored there by the company. They cannot escape any liability which otherwise attaches to them on storing it there merely because they have no tenancy or independent occupation of the land but use it thus by permission of the tenants or occupiers : *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (2) ; *Midwood* v. *Manchester Corporation* (3) ; *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4) Accordingly, I think the appeal of the company fails.

The other appellants, Messrs. Feldman and Partridge, clearly assented to the introduction and storing of the dinitrophenol and, until repayment of their advances to the company, they alone would benefit pecuniarily by the manufacture of picric acid from it. Furthermore, they were personally

(1) L. R. 3 H. L. 330.
(2) [1902] A. C. 381, 392.
(3) [1905] 2 K. B. 597.
(4) [1914] 3 K. B. 772.

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Sumner.

bound to the Minister of Munitions to receive his dinitrophenol at Rainham and use it in manufacturing picric acid, an obligation which, rightly or wrongly, they procured the Rainham Co. to discharge in lieu of themselves. If, then, they were occupiers of the Range site, I think they too would be liable on the principle of *Rylands* v. *Fletcher*. (1) As occupiers they would be under a personal obligation to their neighbours not to let this non-natural user of the land, which they occupied, become a source of damage to them. This obligation it was for them to discharge and, whether they employed agents or independent contractors in connection with the matter, their own obligation persisted. Even if they actually employed nobody, but simply suffered others to manufacture upon the site which they nevertheless continued to occupy, I think they are still under liability to third parties, if what is thus allowed by them, upon the land which they occupy, causes damage.

Before March 22, 1916, it was these appellants who were in occupation of the Range site. Is it proved that they ever ceased to be in occupation? The physical presence and activity of the company's servants, the visits of these two appellants when holding office as the company's directors, and the continuous absence of any person shown to have been acting for or as these appellants and not for or as the company are facts of importance, but are not conclusive. Is it proved, is there any evidence to prove, that the occupation of the company, if any, was exclusive of a continuing occupation by these appellants?

I leave out M. de Gerde and all others than Messrs. Feldman and Partridge. We are told that they "dropped out," and so it seems to be, for it is Messrs. Feldman and Partridge alone who are "vendors" to the company of the tenancy of the site, and, as we do not know that these other parties had any interest outstanding or, if any, what it was, we can say nothing about it. If their position was the same as that of Messrs. Feldman and Partridge, what I have to say of the latter would apply equally to them. If it is not, it need

(1) L. R. 3 H. L. 330.

not be considered, and in either case they are not before your Lordships. The defence pleads that the site was in the occupation of the Ministry of Munitions. Messrs. Feldman and Partridge swore in their answers to interrogatories (which have been referred to at the Bar and I assume were put in at the trial) that the Range works were at the time of the explosion in the occupation of that Ministry. This is not true in fact. The answer seems to be an argumentative one founded on the agreement of August 24, 1915, which does not support it. Mr. Feldman, when called, did not say that any change was made in the occupation of the premises, nor did he say what persons were in occupation at the time of the explosion. He left all this part of the case to be inferred from the agreements and from the evidence of what was done upon the site.

It was proved, indeed, that the company was assessed to the poor rate and that, on proceedings being taken, it was ordered to pay. Whether its liability was questioned and whether the proceedings took place before or after the explosion we do not know. In the latter case, which, upon the dates, is much the more probable, the acceptance of liability by the company may have been only a step towards negativing liability in the other appellants. The fact that the company was rated in the rate-book only shows that the overseers were told, or surmised, that they were in occupation. It is of little value, since we know nothing of their information and they knew nothing of themselves but what they could see on the site. On the other hand, it appears that, after the company was incorporated, no fresh licence under the Explosives Act was taken out in its name, nor was notice given under the Act, that the licence which had been taken out in the name of Messrs. Feldman and Partridge had now been transferred to the company. Accordingly, as far as proof goes of a change of occupation from that of Messrs. Feldman and Partridge to that of the company exclusively of them, I think there is none fit to be acted on. I come, therefore, to the agreements.

By that of March 22, 1916, Messrs. Feldman and Partridge

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Sumner.

purported to sell to the company the benefit of their agreement for the tenancy of the premises from Messrs. Field, and agreed to permit the company to go into occupation forthwith and to remain in occupation as their tenants "until the whole of the purchase consideration has been paid in cash" —a phrase which seems obscure—"and during such occupation the Company hereby agrees to perform all the obligations of the tenants" under the agreement with Messrs. Field, "and from time to time, until payment of the whole of the said purchase consideration, the Company shall be deemed to be retaining possession of the said premises . . . . as the agent of the vendors."

My Lords, whatever else this clause may mean, the presence of the company's servants on the premises, pending a cash payment of the consideration, was not an occupation of the premises by the company to the exclusion of the vendors, Messrs. Feldman and Partridge. The agreed permission of the vendors availed the purchasers nothing, unless the purchasers availed themselves of it, and the agreement that the company "shall forthwith go into occupation" was itself limited by the agreement that nevertheless, until a remote event, its possession was only to be the possession of Messrs. Feldman and Partridge, whose agent it was to be deemed to be. The appellants argue cynically that as they were "deemed" to be agents, it follows necessarily that they were not really agents in fact, or there would have been no deeming about it, but they overlook the real point, which is that, unless this clause made them agents only and kept Messrs. Feldman and Partridge in possession, it was no use at all for the purpose for which it was chiefly intended. The tenants, under the agreement with Messrs. Field, covenanted not to assign, underlet, or part with possession without consent, and Messrs. Field's right to re-enter and to determine the tenancy on any breach of this covenant jeopardised the whole of this speculation, if, as part of the arrangements with the company, the latter should go into occupation, and the appellants, Messrs. Feldman and Partridge, should give it up. Messrs. Field were on the alert. To their inquiry the

appellants' solicitor, with the agreement of March 22, 1916, already signed, cautiously answered that nothing had been done as regards assignment or sub-letting. He said nothing about occupation. Messrs. Field, equally cautiously, ignored his application for permission to do either. Plainly, they stood upon their rights, which were valuable. It was to provide for such a contingency that the curious clause above quoted was framed. The company was to make the picric acid out of the dinitrophenol and so had to be on the site, but the foundation of the whole manufacture would be precarious and the money advanced by Messrs. Feldman and Partridge would be in jeopardy, unless the company could somehow be on the site and yet not be in independent possession of it. No position will satisfy this condition except the presence of the company as agents for the vendors. It may be arguable that the company did not manufacture picric acid, and perhaps did not take in the Minister's explosives except on its own behalf, but how can it be argued that its possession of the site was anything but the possession, in whole or in part, of Messrs. Feldman and Partridge ? Certainly I do not see how the appellants can argue it contrary to their answers to interrogatories, and merely to escape liability for an explosion in the course of a business, in which no one was nearly so much interested as themselves. I have no doubt that they meant to escape liability for explosions if they occurred, and by means of an expedient, ignoble but not unlawful, they hoped they had done so. They steered betwixt Scylla and Charybdis. If all went well they would get back their outlay as vendors to the company, and thereafter make a fortune as its principal shareholders. If the process was a failure, as on a commercial scale it might prove to be, they would lose their outlay but at least not be liable for the company's debts, if any one had been foolish enough to give it credit. If the dinitrophenol exploded and blew up not only the enterprise but its neighbours, they hoped to find in the company a buffer between themselves and the rule in *Fletcher* v. *Rylands*. (1) This was a nice course to hold. It

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

H. L. (E.) 1921 — RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. — Lord Sumner.

was excellent if it could be made good, but unfortunately it required that Messrs. Feldman and Partridge should be at the same time occupiers and not occupiers of the premises demised, which was absurd. They took their chance. Perhaps Messrs. Field would relent and for a consideration would consent to the assignment; perhaps the consideration might not be such as they would recoil from paying; perhaps there might be no explosion; perhaps, if it came to litigation, the clause might hold water. After all, if the explosive blew up before Messrs. Field re-entered, immunity in the subsequent action would be cheaply bought at the loss of the tenancy, for the process would be too hazardous to be continued. They took advice and took the risk. The opinion of Younger L.J. shows that they might hope to succeed, but in my view the judgments below rightly held that they have failed.

LORD PARMOOR. My Lords, the question raised in this appeal is whether the appellants, Messrs. Feldman and Partridge, are liable for the damage done to the properties of the respondents through an explosion at the Rainham Chemical Works on September 14, 1916. The case is one of great difficulty, but it depends mainly on the construction of the second agreement of March 22, 1916, especially of the words in clause 6, which provide that, until the payment of the whole of the purchase consideration, the Rainham Chemical Works Co. shall be deemed to be retaining possession of the premises as agent of the vendors. It is notorious that, in 1915, it was of great importance to obtain an adequate supply of high explosives, and that Lord Moulton, as director-general of explosive supply to the Ministry of Munitions, was engaged in the difficult and anxious task of insuring a sufficient output. At that time there was a serious shortage of nitric acid. Early in the year the appellants verbally informed Lord Moulton of a process invented by two foreign chemists, named David Maron and George Wyss, whereby picric acid could be manufactured from dinitrophenol (hereinafter referred to as D.N.P.) and nitrate of soda. D.N.P.

had been used mainly for the manufacture of dyes, and is a stable compound, which does not explode easily. It is in itself not dangerous. Nitrate of soda is not an explosive, but wood or bags impregnated with moist nitrate of soda will, when dry, burn fiercely if once ignited. Therefore, while neither D.N.P. nor nitrate of soda is, in itself, dangerous, they become a source of danger if stored in close proximity to one another. It is proved that it was due to this cause that the explosion took place. The result of the evidence on this point is, that the manufacture of picric acid from D.N.P. and nitrate of soda may or may not be dangerous in its character, but that in the present instance it was being manufactured under dangerous conditions, and that these dangerous conditions caused the explosion. The principle, therefore, of *Rylands* v. *Fletcher* (1) becomes applicable. The appellants contend that the premises on which the explosion occurred were at the date of the explosion in the occupation of the company, and that the company carried on the manufacture as independent manufacturers and neither on their behalf nor under their control.

On July 14, 1915, the appellants, together with one De Gerde, entered into an agreement with the two chemists that, for the considerations named, the chemists should develop and operate a method discovered by them for the production of picric acid from D.N.P. On August 24, 1915, an agreement was made between the Minister of Munitions on the one part, and six persons, including the appellants and the chemists, on the other part, for the manufacture of picric acid from D.N.P. It was thereby provided that the contractors, as agents of the Minister, should erect and adapt at their works at Rainham suitable buildings, plant, and machinery, and should then, on their sole responsibility and at their own risk, operate, manage, and work the same. It was further provided that the D.N.P. should be supplied by the Minister, and that the buildings, plant, and machinery should remain his property. At this date the appellants had not obtained the lease of the premises

(1) L. R. 3 H. L. 330.

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Parmoor.

at Rainham on which the explosion subsequently took place. This lease was obtained on September 10, 1915, and contained a covenant on the part of the lessees to insure, and not to assign or underlet or part with the possession of the said premises, or any part thereof, without the previous consent in writing of the lessees, except to a department of His Majesty's Government. Arrangements were made for the erection of the factory and plant upon the Rainham site, but, apart from experimental work, manufacture for the Ministry did not commence until after March 22, 1916. There may be some doubt as to this date, but I think this is the correct conclusion.

On March 17 the appellants caused the Rainham Chemical Works Co., Ld., to be registered as a private company. The capital was 5000*l.*, in 100,000 shares of 1*s.* each. Five shillings only were paid up, the shares being distributed between the persons concerned according to their respective interests. Each of the appellants, Feldman and Partridge, received 28½ per cent. of the shares. By art. 2 the company was to forthwith adopt and carry into effect the two agreements of March 22, 1916, of which the draft had already been prepared, and to which reference will be made. The appellants, as governing directors, were to have full control of the business of the company. The company was honestly promoted and for a legitimate purpose. There is no reason why the appellants should not have sought to limit their future liability by the formation of a limited company. Their conduct was bona fide and straightforward, and all the arrangements in connection with the formation of the company were brought to the knowledge of Lord Moulton, as representing the Ministry. If the appellants in fact transferred the occupation of the premises to the company, and further transferred to them the sole responsibility for the manufacture of the picric acid, they would, in my opinion, have freed themselves from the risk of subsequent liability to the respondents. No liability is incurred by the appellants from the fact that they occupied the position of governing directors, with the control of the business of the

company conferred on them by arts. 12, 13, and 14 of the articles of the association.

By the first of the agreements of March 22, 1916, the appellants agreed to permit the company to, and that the company should forthwith go into occupation of the buildings, machinery, and plant, and remain in such occupation as tenants of the vendors until the whole of the purchase consideration had been paid in cash; paying rent and keeping the buildings, plant, and machinery insured against all risks that are capable of being insured against. If there had been no further provision as to the occupation of the premises, the conclusion to be drawn would be that the appellants had placed the company in a position to forthwith go into exclusive occupation of the buildings, machinery, and plant, and to remain there as tenants, subject to any steps which might be taken by the head landlords, Messrs. Field. As a fact, the company did go into occupation and remain in occupation up to the date of the explosion.

There is, however, a further provision. The words are, "that until payment of the whole of the said purchase consideration the Company shall be deemed to be retaining possession of the said premises and plant as the agent of the vendors." Is the effect of these words to substitute a relationship of agency for a relationship of tenancy during the period before payment of the purchase money? By the second agreement of March 22, 1916, the appellants, with the other contractors, purported to transfer to the company the benefit of the agreements of July 14 and August 24, 1915. These agreements were of a personal character, and not capable of assignment, and there was no novation by which the Ministry consented to accept the company in place of the existing obligees. On the other hand, Lord Moulton, as representative of the Ministry of Munitions, was cognisant of all the conditions, and it did not matter by whom the actual manufacture was carried on, so long as there was an assurance that the knowledge and experience of the chemists would be retained. It may be assumed that Lord Moulton was prepared to expedite any arrangement under which, at a critical time, a supply of picric

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Parmoor.

acid might be obtained from D.N.P., under the new process. There is no evidence that the appellants interfered in any way in the manufacture of the picric acid, or that they had any responsibility for the placing of D.N.P., and the bags and boxes which contained nitrate of soda, in close proximity.

I agree with Younger L.J. that the company was not, at the date of the explosion, carrying on the manufacture of picric acid as agent for the appellants, and that in respect of the contract with the Ministry, the company did not act as the agent of the appellants. As pointed out by Sir John Simon, there were none of the indicia from which the relationship of agency would ordinarily be implied. If this agency could be established it would follow that the appellants are liable in the action; but in my opinion it has not been established.

In order to determine whether, under the above conditions, the appellants are liable, it is essential that there should be no confusion of the grounds on which liability has been suggested. In the first place I think that the appellants cannot be held liable, either directly or indirectly, as governing directors of the company, and to hold them to be so liable would be inconsistent with established principles. The appellants, as governing directors, incurred no personal liability. Directors of a company, which has been bona fide established, cannot be regarded as principals for whom the company act as agents. Whatever may be the true meaning of the passages in the judgment of Scrutton L.J., to which reference has been made, there is no evidence that the company was a sham, or that the relationship between the directors and the company was either abnormal, or based on a sham procedure.

In the second place there is no evidence of negligence on the part of the appellants such as would make them liable. The manufacture of picric acid was carried on by competent experts and employees in the service of the company, and subject to the supervision of the Ministry. The only ground on which, in my opinion, the appellants can be held to be

liable, is that they had not transferred to the company the exclusive occupation of the premises on which the explosion occurred. That they became tenants of these premises as lessees of Messrs. Field is unquestioned, but were they in any sense in joint occupation of the Range Works on September 14, 1916, when the explosion occurred? The answer to this question depends on the terms of the first agreement of March, 1916, and of the conduct of the parties thereunder. If the company became tenants in exclusive occupation of the Range Works, the appellants would not be liable on the ground that they had demised to the company premises and plant capable of being so used as to create a nuisance although the tenant has so used it: *Rich* v. *Basterfield*. (1) The same principle has been restated in *Malzy* v. *Eichholz*. (2) The Master of the Rolls, Lord Cozens-Hardy, says: "It is quite a novel doctrine to me that permission by a lessee to use demised premises for a purpose which may or may not involve or create a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because a person does carry on that business in such a manner as to create a nuisance. It would be different, of course, if it were let for a purpose which necessarily involved a nuisance, but this letting did not necessarily involve a nuisance." In the present case the manufacture of picric acid did not necessarily involve a nuisance, and the appellants could not, as lessors, be rendered liable merely because the company did in fact carry on the business in such a manner as to create a nuisance. In his judgment the Master of the Rolls refers to an unreported case of *Harris* v. *Bentley* (3), in which Lord Collins said: "If the evidence showed acquiescence by the landlord carried to such a point as to found an inference that the landlord actively participated in the use of the flats for immoral purposes, possibly there might be a breach of the contract." There is no evidence of such acquiescence by the appellants. The cases in which a landlord has been held liable, although employing independent

(1) 4 C. B. 783. (2) [1916] 2 K. B. 308, 315.
(3) See 87 L. T. 694.

H. L. (E.) 1921 RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. Lord Parmoor.

contractors, are either where a nuisance was in existence at the date of the letting, or where there was an antecedent duty which could not be transferred to another person. These cases are not applicable to the conditions in the present case.

In *Pickard* v. *Smith* (1) the defendant occupied a refreshment-room and coal-cellar at a railway station, the trap of the coal-cellar being in the platform of the station. The plaintiff, a passenger by the railway, fell down the opening while the trap-door was raised for the purpose of the coal merchant discharging coal into the cellar, and was under the coal merchant's control. The defendant was held liable as the occupier of the cellar, and Williams J., after referring to the rule which exempts the employer from liability for the negligence of an independent contractor employed by him to do a lawful act, says, "That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." In the present instance it cannot be said that the company was employed to carry out the manufacture of picric acid in a dangerous manner, or that it was entrusted with the performance of a duty incumbent on the appellants. In *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (2) the contractor had built a bridge so as to obstruct the navigation, and not in conformity with the restrictions imposed by Parliament. In such a case an employing company cannot avoid the responsibility of compliance with statutory restrictions by employing some other person to do the work, but in the present case no such question arises for decision. In the *Wimbledon Case* (3) the duty on the defendants on which their liability was based, was not to make a hole in the highway without guarding it. A common factor in all these cases was some antecedent duty towards the

(1) (1861) 10 C. B. (N. S.) 470, 480. (2) (1861) 6 H. & N. 488.
(3) [1899] 2 Q. B. 72.

plaintiff which could not be displaced by the employment of an independent contractor, but I agree with Younger L.J. that the appellants individually owed no duty to the respondents in respect of the care of the D.N.P. after deposit, assuming that the company were independent contractors, and that by reasonable care on their behalf danger might have been avoided.

The only way in which the appellants can be held to be liable is that they had not parted with the premises and plant to the company so as to divest themselves of their occupation and occupation rights. I do not doubt that the company were in actual physical possession of the Range Works when the explosion occurred, but I am not satisfied that the appellants had not certain rights of joint occupation. The sale contemplated under the agreement of March 22, 1916, had not been carried out at the date of the explosion. Para. 6 of the agreement has already been quoted. There is on the face of it an inconsistency between the company going into occupation as tenants of the appellants and the company being deemed to be in possession, as agents of the tenants, and on the whole it appears to be an arrangement under which the appellants did retain some occupation interest in the premises and plant. It is on this ground that I do not dissent from the opinions which have been expressed to your Lordships, although, on all other points, I am in agreement with the judgment of Younger L.J. in favour of the respondents.

LORD WRENBURY. My Lords, I have had an opportunity of considering the opinion expressed by my noble and learned friend Lord Buckmaster. I agree with it and have thought it unnecessary to express any separate opinion of my own. I think the appeal should be dismissed.

LORD CARSON. My Lords, it was not seriously argued before us that the defendant company was not liable for the damages caused by the explosion which occurred at the Range Works, Rainham, on September 14, 1916, and the

H. L. (E.) 1921 — RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO. — Lord Carson.

real point to be determined is as to the liability of the defendant appellants, Feldman and Partridge. One cannot help noticing at the outset that the company and these defendants filed a joint defence to the claim made upon the plaintiff and have at no time attempted to sever that defence, nor indeed, so far as I can understand the pleadings in this action, is there any discrimination attempted as to the liabilities of each set of defendants. They both relied upon the occupation as being that of the Ministry of Munitions, and I do not find anywhere any direct traverse of the statement made in the amended statement of claim that the defendants Feldman and Partridge at the date of the explosion occupied the land and premises in question and there carried on the manufacture of picric acid from dinitrophenol. In the fifth paragraph of the amended defence it is stated as follows: "In the alternative the Defendants will contend that the said explosion occurred in the course of and by reason of the performance by the Defendants as agents for the Ministry of Munitions, &c." I do not desire to attach undue importance to the case as presented upon the pleadings, though I think at times too little regard is paid to the case formulated by the parties themselves, and in a serious case of this kind, where the difficulty is in ascertaining the question of the occupation of both classes of defendants at the time of the explosion, one cannot but give some weight to the views the parties themselves took as to what was to be taken as the state of facts existing when their liability was challenged in a matter of such immense importance. With a great deal of the very able judgment of Younger L.J. I am in entire agreement, and I am prepared, as he is, to give the fullest effect to the incorporation of the appellant company on March 17, 1916, as a separate entity the existence of which cannot be challenged by alleging that it was a sham or that there was anything improper in the incorporation of it for the purpose of limiting the liability of the other defendants. Where I differ from the learned Lord Justice is that I am not satisfied that Feldman and Partridge had ever ceased to be in occupation, notwithstanding the

existence of the company, having regard to the various agreements which were entered into at its incorporation and regulated the interests of the company and the said defendants respectively. There is no doubt that before the formation of the company Feldman and Partridge were in occupation of the Range site for the purpose of arranging to carry on under an agreement with the Ministry of Munitions the manufacture of picric acid from dinitrophenol and nitrate of soda, and the difficulty I have felt is that I cannot find anything in the facts proved and having regard to the terms of the agreements which shows such a fundamental change as to lead me to the conclusion that these appellants ever ceased to be in occupation. Clause 6 of the agreement of March 22, 1916, for sale to the company of the premises, etc., while it states that the company shall forthwith go into occupation, provides that it shall remain in such occupation as tenants of the vendors until the whole of the purchase consideration has been paid in cash, and adds that until the same event the company shall be deemed to be retaining possession of the said premises, etc., as the agents of the vendors, that is, Feldman and Partridge. It is unnecessary after the judgments which have been already delivered to deal with the agreements at length or to examine further the position of the said defendants in relation (1.) to the Ministry of Munitions, with whom it is enough to say they continued to have a personal contract for the manufacture of the explosives; or (2.) to their landlords, with whom they had a contract not to assign or underlet or part with the possession of the premises without the consent of the landlords, which, though applied for, had never been obtained. (See the letter of April 6, 1916, Becher to Field, p. 154 of the Appendix.) Under these circumstances, whilst there is no doubt the company was in occupation and actively engaged in the manufacture of explosives, I find it impossible to come to the conclusion that the defendants ever ceased to occupy the premises prior to the date of the explosion; and coming to that conclusion they are in my opinion equally liable with the defendant company for a claim based upon the doctrine

H. L. (E.) 1921

RAINHAM CHEMICAL WORKS, LD. v. BELVEDERE FISH GUANO CO.

established by the case of *Fletcher* v. *Rylands*. (1) I think, therefore, that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1921.

Solicitors for the appellants: *Rhys Roberts & Co.*
Solicitors for the respondents: *Savory, Pryor & Blagden.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *July* 18.

FRENCH MARINE . . . . . APPELLANTS;

AND

COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ . . . . . RESPONDENTS.

Shipping—Charterparty—Time Charter—Impossibility of Performance—Construction—Payment monthly in Advance—Extension of Charter beyond Stipulated Period—Frustration of Adventure—Requisition by Government—Right of Charterers to pro rata Adjustment.

A steamer was chartered for four months by a charterparty which provided for payment of a fixed hire per month and pro rata for any fractional part of a month until redelivery to owners as therein stipulated; payment of hire to be made in London monthly in advance. Redelivery was to be at a United Kingdom coal port. Should the steamer be on a voyage at the expiration of the period fixed by the charter the charterers were to have the use of the steamer at the rate and on the conditions therein stipulated, to enable them to complete the voyage, provided that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter. Money in dispute to be deposited at a bank in the joint names of the parties at the place of payment of the hire until the settlement of the dispute by arbitration. Provision was made for the cesser of hire in the event of a breakdown of machinery or of the steamer being lost or missing. The period fixed by the charter expired on August 10, 1919.

In July, 1919, the charterers loaded the steamer at Antwerp with a

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

* *Present:* VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

cargo for Toulon with the intention that she should return to Great Britain with a cargo from Toulon. The steamer arrived at Toulon, but the discharge of her cargo was not completed until August 16, when she was requisitioned by the Shipping Controller and sent to Australia:—

Held, first, that the stipulation for payment in advance applied to a case of extension of the charter beyond the charter term, and that on August 10 a full month's hire was payable by the charterers.

Tonnelier v. *Smith* (1897) 2 Com. Cas. 258 applied.

Held, secondly, by Lord Dunedin, Lord Sumner, and Lord Parmoor, Viscount Finlay and Lord Wrenbury dissenting, that the charterers were not entitled to a pro rata adjustment by reason of the frustration of the adventure.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal, affirming an order of Bailhache J., reversing, upon one point, the decision of the umpire in an award made in the form of a special case in an arbitration between the parties.

The appellants were the charterers and the respondents were the owners of the steamship *Ardoyne* under a charterparty dated March 13, 1919. The charterparty was for the term of four months commencing April 10, 1919, when the *Ardoyne* was placed at the disposal of the appellants. Owing to the action of the Shipping Controller, who directed the *Ardoyne* after completion of her discharge at Toulon to proceed to Australia for the Royal Commission on Wheat Supplies for the United Kingdom, the *Ardoyne* was redelivered to the respondents at Toulon on August 16, 1919. The respondents disputed the right of the appellants to redeliver at Toulon as not being a compliance with the terms of the charterparty but took delivery without prejudice to their rights.

The facts are fully set out in the judgment of Viscount Finlay and are summarised in the headnote.

In accordance with a provision in that behalf in the charterparty certain matters in dispute were referred by the parties to arbitration, and, the arbitrators having failed to agree, an umpire was appointed. Of the matters in dispute the third alone was the subject of the present appeal—namely: "3. Whether the French Marine were bound on August Tenth, One thousand nine hundred and nineteen, to pay a full month's hire of the said steamer or whether they were

H. L. (E.) 1921 — FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. —

bound to pay only a fractional part of a month's hire for the period from the Tenth August, One thousand nine hundred and nineteen until the steamer was redelivered to the Chartered Owners."

The umpire decided, subject to the opinion of the Court, that the French Marine were only liable to pay a fractional part of a month's hire from August 10, 1919, up to the date when the steamer was redelivered to the chartered owners.

Bailhache J. held that on August 10, 1919, there was a full month's hire payable to the owners and that no portion of it was returnable, and the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.) affirmed his decision.

1921. May 5, 6. *Leck K.C.* and *Langton* for the appellants. The question is whether, where there has been a frustration of the adventure and the hire is made payable in advance, the charterers are entitled to a return of a proportionate part of the money. The appellants submit that no sum had become due or payable to the owners before the date when the contract was ended by frustration of the adventure except hire from August 10 to August 16 when the ship was redelivered. Bailhache J. and the Court of Appeal decided against the claim of the charterers on the authority of *Tonnelier* v. *Smith*. (1) In that case the majority of the Court of Appeal, Lord Esher M.R. and Rigby L.J., held, reversing the decision of Mathew J., with whom A. L. Smith L.J. agreed, that under a provision in a charterparty that payment was to be made monthly in advance the charterer was liable to pay a full month's hire to the owner, even though it was clear that the ship would be redelivered before the expiration of the month. But that case is distinguishable from the present, first, because here the question arose with regard to a period after the charterparty term had expired and, secondly, because there is a special provision in clause 7 of the charterparty (which relates to redelivery) for money in dispute to be deposited at a bank in the joint names of the parties—a

(1) 2 Com. Cas. 121, 258.

provision designed to meet the position created by *Tonnelier's Case*. (1) But, unless distinguishable, that case was wrongly decided. Scrutton L.J. also relied on *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (2) which decided that if the charter was frustrated during the month, money paid in advance for the full month could not be recovered back in so far as it related to the part of the month after the frustration took place. That case may be distinguished by the fact that the money had in fact been paid in advance for a period part of the charterparty term, but, unless distinguishable, it is wrong as being an erroneous application of the principle that the loss must remain where it was at the time when the contract was dissolved by frustration of the adventure. That principle is illustrated by the Coronation cases: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3); *Blakeley* v. *Muller & Co.* (4); *Chandler* v. *Webster* (5); *Elliott* v. *Crutchley*. (6) The payment in advance under the charterparty was provisional only, as was admitted in *Tonnelier's Case* (7) and on the dissolution of the contract by the frustration of the adventure the owners were absolutely entitled to so much only of the amount as represented hire which was actually earned. The decision in *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (2) that the owners were absolutely entitled to retain the whole of the hire provisionally paid in advance gave them more than they were entitled to at the time when the contract came to an end.

R. A. Wright K.C. (with him *Jowitt*) for the respondents. The question is what on the happening of the frustration were the rights and obligations of the shipowner and charterer respectively. Unless there is in the contract some specific provision dealing with this contingency, which ex hypothesi is unlikely, the position remains as it was at the moment of frustration and money paid under the terms of the contract cannot be recovered: *Chandler* v. *Webster* (8); *Elliott* v.

(1) 2 Com. Cas. 121, 258.
(2) (1917) 33 Times L. R. 390; 34 Times L. R. 70.
(3) [1903] 2 K. B. 756.
(4) [1903] 2 K. B. 760n.
(5) [1904] 1 K. B. 493.
(6) [1904] 1 K. B. 565.
(7) 2 Com. Cas. 258.
(8) [1904] 1 K. B. 493, 499.

H. L. (E.) 1921 — FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

Crutchley. (1) The frustration does not affect vested rights, nor can it create new rights, because otherwise the Court would be making a new contract for the parties. As this contract contains no provision with reference to the termination of the contract by frustration the rights existing before the frustration remain undisturbed. Any attempt to effect an adjustment is impossible, because that is to add a new term to the contract. At the time of the frustration the position was this : The ship was at Toulon. The charterers were under an obligation to redeliver at a coal port in the United Kingdom. The shipowners had a right to that redelivery and were entitled to their hire until that event. It is not right to say that under this contract the payment of the hire is commensurate with the beneficial user of the ship ; the charterers had to do something at their own expense for the benefit of the shipowners—namely, to redeliver the ship in accordance with the terms of the contract. The charterparty provides for the recovery of the hire in certain contingencies but it contains no provision to meet this particular contingency. The respondents concede that if there had been redelivery and no frustration the appellants would have been entitled to recover a proportionate amount of the money. Although the hire is paid in advance the shipowners have no right to the money after redelivery ; but to warrant a return of the hire there must be something in the charterparty to provide for it. On the question whether the month's hire was payable in advance *Tonnelier's Case* (2) is conclusive and there is no ground for questioning that authority.

[He also referred to *Watson Steamship Co.* v. *Merryweather & Co.* (3) as to redelivery.]

Langton replied.

The House took time for consideration.

1921. July 18. VISCOUNT FINLAY. My Lords, the question in this case is as to the amount due from the French

(1) [1904] 1 K. B. 565, 568. (2) 2 Com. Cas. 258.
(3) (1913) 18 Com. Cas. 294.

Marine to the respondent company in respect of the hire of the steamship *Ardoyne* under a charterparty dated March 13, 1919.

The dispute was referred to arbitration, and the arbitrator made his award in the form of a special case, raising three questions, of which the third alone is now material: "3. Whether the French Marine were bound on August Tenth, One thousand nine hundred and nineteen, to pay a full month's hire of the said steamer, or whether they were bound to pay only a fractional part of a month's hire for the period from the Tenth August, One thousand nine hundred and nineteen until the steamer was redelivered to the Chartered Owners." The arbitrator awarded as follows: "That the French Marine are not and were not on the Tenth August, One thousand nine hundred and nineteen liable to pay a whole month's hire on that date, but are and were only liable to pay to the Chartered Owners a fractional part of a month's hire from August Tenth, One thousand nine hundred and nineteen up to the date when the steamer was redelivered to the Chartered Owners. . . . . But this award is subject to the opinion of the Court on the following Special Case which is stated at the request of the parties."

The special case incorporated the charterparty. The charterparty was between the respondent company as owners of the steamship *Ardoyne* and the appellants, the French Marine, charterers. Clause 1 states that the owners agreed to let, and the charterers to hire, the steamer for the term of four calendar months from the time when the steamer was placed at the disposal of the charterers. The following are the other clauses material to the present question:—

"5. That the said Charterers shall pay as hire for the said steamer 25*s.* per ton deadweight, say nine thousand two hundred and fifty pounds per calendar month, commencing from the time the Steamer is placed at the disposal of Charterers, and *pro rata* for any fractional part of a month (the days to be taken as fractions of a month of 30 days) until her re-delivery to Owners as herein stipulated.

"That the payment of the hire shall be made as follows:

H. L. (E.) 1921

FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

Viscount Finlay.

In London in cash, without discount, monthly in advance to Ernest Bigland & Co., Ltd.

"In default of such payment or payments, as herein specified, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers under this Charter."

"7. That the steamer (unless lost) shall be re-delivered on the expiration of this Charter Party, in same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in Charterers' option in a United Kingdom Coal Port. Charterers giving disponents of steamer seven days' notice of expected date of re-delivery between the hours of 6 a.m. and 6 p.m., but the day of re-delivery shall not be a Sunday or legal holiday, always unless Owners agree to take re-delivery earlier.

"The Charterers to give the Owners not less than ten days' written notice at which port and on about which day the steamer will be re-delivered.

"Should the steamer be on a voyage at the expiration of the period fixed by this Charter, the Charterers are to have the use of the steamer at the rate and on the conditions herein stipulated to enable them to complete the voyage, provided always that the said voyage was reasonably calculated to be completed about the time fixed for the termination of the Charter.

"Money in dispute to be deposited in the joint names of the parties to this charter party with approved bankers at the place of payment of the hire until the dispute has been settled by the arbitrators."

"12. That in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the

cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for Charterers' account."

"18. That should the steamer be lost or missing the hire shall cease from the date when she was lost or last spoken, or, if not spoken, then from the date when last seen, and hire paid in advance and not earned shall be returned to the Charterers."

"21. That the Owners have a lien upon all cargoes and all sub-freights for hire and general average contribution, and for all expenses and damages due under or for breach of this charter and Charterers to have a lien on the steamer for all moneys paid in advance and not earned."

"31. Should steamer be in a position to give re-delivery under this charter within 10 days before the expiration of the stipulated Charter period of four months, disponents agree to accept re-delivery then. If the steamer should be in a position to give re-delivery at an earlier date than 10 days before the expiration of the stipulated Charter period Charterers have the right to arrange for the steamer to perform a voyage reasonably calculated to be completed within 10 days after the expiration of the Charter period."

The special case then proceeds to make a statement of the facts, which may be summarised as follows:—

The steamer was placed at the disposal of the charterers on April 10, 1919. In consequence of a letter from the British Shipping Controller of June 16, 1919, the charterers caused the *Ardoyne* to be loaded at Antwerp with a cargo of coal for Toulon with the intention that she should return to Great Britain with a cargo of mineral. After the vessel was so loaded there was correspondence between the British Ministry of Shipping and the charterers by letters of July 9, 10, and 14, 1919, all of which are set out in the case. What ensued is stated in paras. 5 and 6 of the case:—

"5. On the Fourteenth July, One thousand nine hundred and nineteen, the Shipping Controller issued his licence in

H. L. (E.) 1921 — FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. — Viscount Finlay.

respect of the *Ardoyne* for a voyage from Antwerp to Toulon with a cargo of coal, and endorsed the licence with the following words :—'Thence Australia to load for Royal Commission on wheat supplies.'"

"6. The *Ardoyne* accordingly proceeded from Antwerp to Toulon and delivered her cargo of coal at the latter place, and the French Marine gave notice to the Chartered Owners that on completion of the discharge of her cargo at Toulon the *Ardoyne* would be re-delivered to the Chartered Owners as they were prevented by the action of the Shipping Controller from bringing the ship back to the United Kingdom with a cargo of ore as had been intended. The Chartered Owners disputed this view but, in order to save waste of tonnage and without prejudice and reserving their rights, took delivery of their steamer at Toulon from the French Marine on the Sixteenth August, One thousand nine hundred and nineteen. The steamer then proceeded on her Australian voyage pursuant to the directions of the Shipping Controller."

In para. 10 of the case the arbitrator says :

"I am of opinion and, so far as questions of fact are involved, find as follows :—

"(*a*) That the commercial adventure contemplated in the charter party of the 13th March, 1919, was frustrated as from 16th August, 1919, by the direction of the Shipping Controller that the said steamer should proceed to Australia to carry from there a cargo of wheat for account of the Royal Commission on wheat supplies.

. . . . . .

"(*d*) That the French Marine were therefore justified in re-delivering the steamer to the chartered owners at Toulon on completion of the discharge of the coal cargo.

"(*e*) That the French Marine are not and were not on the 10th August, 1919, liable to pay a full month's hire of the steamer on that date, but are and were only liable to pay a fractional proportion of a month's hire from the 10th August to the 16th August, when the steamer was re-delivered as aforesaid."

The question for the opinion of the Court is stated as being

whether his opinion expressed in para. 10 so far as it involves questions of law is right.

It is obvious that the arbitrator's finding means that the owners of the vessel are entitled, in respect of the period from August 10 onwards only, to hire from the days from August 10 to 16, and I shall deal with the case on this footing. The question cannot be read as relating only to a provisional payment on August 10 subject to liability to account. The real question is as to the rights of the parties with regard to the final payment.

The answer to the question raised by the case must depend upon the construction to be put upon the charterparty.

The term of the charterparty is four calendar months (clause 1). The hire (clause 5) is 9250*l.* per month and pro rata for any fractional part of a month until her redelivery to owners as stipulated. The payment is to be in London in cash, payable monthly in advance, and in default of such payment the owners may withdraw the steamer.

The first question that arises is whether the provisions of clause 5 for payment of the monthly hire in advance apply in cases of an extension of the charterparty beyond the four months certain. That this was a very debatable point is shown by the fact that while Lord Esher and Rigby L.J. answered this question in the affirmative, two judges of wide commercial experience (A. L. Smith and Mathew L.JJ.) answered it in the negative: *Tonnelier* v. *Smith.* (1) Whatever view I might have been disposed to take upon this point, if it were a new one, I think we ought to follow the decision of the majority of the Court of Appeal given in that case nearly a quarter of a century ago. It has no doubt been acted upon since then, and, apart from the fact that it was given by a Court of very high authority, I do not think it would be right to depart from the practice as settled by that case, as innumerable charterparties must have been entered into on the view that that decision was good law.

For these reasons I think we ought to hold, as the Court of Appeal held in 1897, that the whole of the monthly hire was

(1) 2 Com. Cas. 121, 258.

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Viscount Finlay.

payable in advance on August 10, but it appears to me clear, upon the charterparty and on authority, that any such payment is provisional merely, and if, at the end of the period, it is found that less hire has been earned the owner must account for the excess to the charterer. This was so held in express terms by the Court of Appeal in the case which I have just referred to (*Tonnelier* v. *Smith* (1)), and it was on this basis that the Court of Appeal arrived at the conclusion that the monthly hire was payable in advance under such an extension.

Apart from authority, how does this question stand upon the terms of the charterparty ?

The hire was for a calendar month 9250*l.* and for any fractional part of a month pro rata. If the use under the charterparty is only for a portion of a month the hire is according to the number of days computed pro rata on the basis of 9250*l.* for the whole month. Whenever there is a broken month the hire is less in proportion. It would be extraordinary if, when during any month the hire earned under the charterparty is, say, 2000*l.*, being pro rata, the owner should be entitled to retain the whole month's hire, 9250*l.*, which had been paid in advance. There might be a bargain to this effect, but very clear words would be necessary to compel such a construction. If it appears when the month in question ends that the user has been for a week only, surely the reasonable view is that the owners must pay back three-fourths of the whole month's hire which they received in advance.

Payment in advance is highly expedient, for in many cases if the money be not paid in advance it may be very difficult to enforce payment by the charterer, who may belong to a foreign country and not be amenable to English law. The payment in advance is really intended to secure the owner. The right of the charterer to repayment of the amount paid in advance in excess of what is earned does not rest merely upon special provisions in the charterparty as to particular cases. It rests upon the provision of clause 5 that if there

(1) 2 Com. Cas. 258.

has been less than a month's use the payment is to be in proportion only. Certain special cases are particularly dealt with in the charterparty, but the enumeration is not exhaustive; wherever there has been a provisional payment in advance for a month if it be found that less has been earned during the month the recipient must account for the excess.

One of the commonest cases in which the vessel is used for a fraction of a fresh month after the expiration of the period of the charterparty would be when from some accidental cause she does not reach the home port for redelivery to the owner till some time, say, a week after the time fixed in the charterparty has expired. A whole month's hire is paid in advance when the month begins, but the owner can keep only what represents a week's hire. The right to the return in this case is not expressly given in the charterparty, but it follows from the terms of clause 5.

A second case receives special treatment. If a vessel is on a voyage at the expiration of the period fixed by the charterparty the charterers are to have the use of the steamer to complete the voyage on the chartered terms, which include payment pro rata, provided the voyage was reasonably calculated to be completed by the time of the termination of the charter (clause 7, third sentence). It is obvious that this is intended to provide for voyages other than the mere voyage home for redelivery, which requires no special provision.

A third case is that dealt with by clause 12. If there is loss of time from deficiency of men or owner's stores, breakdown of machinery or accident preventing the working of the steamer and lasting for more than twenty-four hours, the hire ceases till she is in an efficient state to resume her services. A corresponding amount would have to be accounted for when the amount of hire up to the end of the month is settled. The right is obvious though there is no express provision for it. On the other hand, the concluding part of clause 12 provides that in case of loss of time owing to the vessel's being driven into port or having to anchor by

H. L. (E.) 1921

FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

Viscount Finlay.

reason of bad weather or detention by bars in shallow water, etc., the time lost is to be for the charterers' account.

A fourth case is dealt with in the charterparty, that of the steamer's being lost or missing, and it is provided that the hire is to cease from the time she was last seen or spoken to. This is the case dealt with by clause 18, and it is only here that the words are added, "and hire paid in advance and not earned shall be returned to the charterers." We were informed during the argument that this form of charterparty has grown gradually and has been altered from time to time. We do not know how these words came to be inserted here and here only, but it cannot be seriously contended that this is the only case in which the owner is to account for hire which he received in advance but has not earned. I think that this sufficiently appears from the scope of the clauses to which I have already referred.

Further, the terms of clause 21 show that the charterers have, under the charterparty, this right to a return of moneys paid in advance and not earned. I have endeavoured to show that clause 5 and other clauses preceding this clause 21 conferred this right in all cases. Clause 21 recognizes the existence of this right and gives a special remedy for its enforcement by providing that the "Charterers are to have a lien on the steamer for all moneys paid in advance and not earned."

A good deal of confusion has been introduced into this case by the argument put forward for the respondents that it is a case of "frustration," and that it is to be governed by rules laid down in some cases where there has been "frustration of the adventure" owing to some unexpected event. The truth is that this is simply a case in which the action of the British Government in requisitioning the vessel prevented the owner from being able to give to the charterers after August 16 the use of the vessel. The case need not be encumbered by the discussion of rules which have been laid down for cases in which some supervening event so profoundly modifies the circumstances affecting a contract as to justify its being treated as at an end. All that has happened here

is that as the British Government took the vessel out of the hands of the owner he could not go on giving the charterers the use of it. As he could not give the use of the vessel after August 16 the freight ceased to be payable. After August 16, no freight could be earned by him with the *Ardoyne* from the French Marine for the reason that the vessel was employed by orders of the British Government in earning freight for the owner, by carrying wheat from Australia at remuneration given by the British Government. That remuneration may be adequate or inadequate. With that we are not concerned. What is certain is that this employment of the vessel prevented the owner from giving the use of the vessel under the charterparty to the French Marine for more than a fractional period of the month. The freight ceased with the cesser of the use of the ship.

I have endeavoured to show that upon the construction of the charterparty the payment of the month's hire, 925*l.*, on August 10 was purely provisional and subject to account at the end of the user during the month ending September 10. This very point was decided in the case of *Tonnelier* v. *Smith*. (1) In that case the charterparty provided that the charterer should pay for the hire of the vessel at the rate of 709*l.* per calendar month from the time she came on hire and at the same rate for any part of a month, hire to continue until her redelivery to the owners unless lost, payment of the said hire to be made in cash in London monthly in advance. The term of the charterparty was for the time required for performing a round voyage out and home with an option to continue the charter for a further period of one second round trip. This option was exercised, and the vessel arrived at Middlesborough, her final port of destination on the second round voyage, on January 13. A fresh month of hire was begun on January 19, and the shipowner demanded payment on that date of 709*l.*, a whole month's hire. The charterers tendered a sum representing hire up to January 28, by which time he reckoned the vessel would be discharged and ready for delivery. Mathew J. held that the charterers' contention

(1) 2 Com. Cas. 121, 258.

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Viscount Finlay.

was right. "The charterer," he said (1), "must calculate what the sum is likely to be and pay it to the owners. If it be too much the amount overpaid will be returned. If too little the charterer is liable for the balance." The case went to the Court of Appeal. A. L. Smith L.J. agreed with Mathew J., but the majority of the Court, Lord Esher M.R. and Rigby L.J., were of the contrary opinion, and held that the shipowners were entitled to have full payment of a month's freight made on January 19. They gave as a reason that the payment was provisional only and subject to adjustment according to the time actually taken. Rigby L.J., in delivering the judgment of Lord Esher and himself, after referring to the terms of the charterparty (which are very similar to those of the charterparty in the present case), went on to say as follows :— (2)

"The last provision, that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid—a right which would effectually secure prompt repayment of those amounts. The special provision for repayment in case of loss is intended to fix readily the actual amount to be repaid, and cannot be construed, regard being had to the lien on ship given to the charterer in respect of all unearned payments, as limiting repayments to the sole case of loss. The provisions in favour of the owners, first, for advance payment of freight, and, secondly, for lien on cargo and sub-freights, were plainly intended to relieve the owners as far as possible from the necessity of having to bring a personal action against the charterer, and may have the more importance when, as here, the charterer is a foreigner and might have to be sued, if at all, in his own country. At no time during the term of the charterparty could it be ascertained with certainty on one of the days fixed for monthly payments how much freight would actually be earned during

(1) 2 Com. Cas. 124. (2) Ibid. 265.

the month. The ship might be disabled or even lost just after the date fixed for the monthly payment, and then only a day's freight might be earned. Even when it appears probable that only a day's freight will be earned, some circumstances—as, for instance, a strike—may intervene to delay the date of discharge and delivery up, and in the result a whole month's freight may, after all, be earned. The greater or less degree of probability of the happening of the events which will determine how much freight is to be earned is nowhere referred to in the contract, and can scarcely afford a rule for construing it."

The whole of this last passage from the judgment of the Court of Appeal is exactly in point upon the construction of the charterparty in the present case. The judgment of the Court of Appeal proceeds on the ground that the payments in advance are provisional only and not final, and that the charterer would be entitled to postpone delivery of the ship until the unearned payments were repaid, and that the special provision for repayment in case of loss cannot be considered, regard being had to the lien on the ship given to the charterer in respect of all unearned payments, as limiting repayments to the sole case of loss.

I have given my reasons for thinking that this conclusion is correct, and that it is so appears to me to follow not merely from the provisions specially referred to by Rigby L.J., but from the whole frame of the charterparty under which, when the hire is for a fractional part of a month, the payment is to be proportionately reduced. It would require a very strong case to justify us in departing from the practice sanctioned by the decision of the Court of Appeal in 1897.

I desire to add a few words as to one suggestion which was thrown out in argument—namely, that there had been no delivery of the ship as stipulated in the charterparty, so that the right to hire would run on after the requisition. It is true that payment of hire was by the terms of clause 1 to go on until re-delivery of the ship to the owners, as stipulated in the charterparty. The requisitioning of the *Ardoyne* by the British Government, however, would obviously, on

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Viscount Finlay.

possession being taken under the requisition on behalf of the British Government, amount to a determination of the possession of the charterers and a transfer of possession to the British Government on the terms of their requisition and under any liability to the owners which the requisition entailed. The owners themselves took delivery of the steamer at Toulon, but without prejudice, and reserving their rights, and the vessel proceeded from Toulon on her voyage to Australia under the orders of the Shipping Controller on behalf of the British Government. It seems to follow that with this delivery the hire under the charterparty must have stopped running.

I have already referred to the use that has been made of the phrase "frustration" with reference to the cesser of the user of the *Ardoyne* as an argument for leaving the owner in possession of the whole 9250*l*. It was said that when an adventure is "frustrated" things must remain as they are, that the money remains with the man who has it, that the contract is gone, and therefore that there is no right to have any part of the month's hire returned. The distinction between the present case and such "frustration" as was deemed to have occurred in the group of cases called the Coronation Cases is obvious. In those cases the payments had been made not provisionally but absolutely, and the person who had received the money was held entitled to keep it after the "frustration." In the present case the payment was provisional and subject to adjustment according to the time during which the hire might last. "Frustration" cannot convert a provisional payment into an absolute one. If it did it would not leave the parties in statu quo but would make a most material alteration in the position of the person who had paid the money. The very act of requisition relied on as a "frustration" put an end to the hiring, as the ship was taken from the charterer and handed over to the British Government. The requisition made it impossible that the hiring under the charterparty should continue beyond August 16, and it follows that the charterers are liable only for six days in August.

In my opinion the French Marine were bound to pay a full month's hire of the steamer on August 10, 1919, but this payment would have been provisional only, and in the events which happened they are only liable to pay a fractional proportion of a month's hire—namely, from August 10 to August 16, when the steamer was redelivered under the circumstances I have stated.

In my opinion the appellants substantially succeed, and should have their costs on this appeal and in the Courts below.

LORD DUNEDIN. My Lords, strictly speaking the question put by the umpire is limited to the determination of whether the appellants were liable on August 10 to pay a month's hire in advance. *Tonnelier* v. *Smith* (1) decided in a case for all practical purposes the same as the present as regards the phraseology of the charter that the payment must be made. I agree with your Lordships that, though not technically binding, the case of *Tonnelier* has ruled practice so long that it ought not to be disturbed unless we thought it was clearly wrong. I cannot say that. Further, I think it is unavailing to distinguish *Tonnelier's Case* (1) from the present on the ground of the provision in clause 7 that money in dispute should be deposited in a bank. On August 10 there was no reason to hold that any money was in dispute, and further, the clause has ample justification in regard to disputes as to coals and other matters of the same sort.

The case, however, has not been confined within these strict limits. Assuming that the full month's hire ought to have been paid in advance on August 10, yet upon the doctrine which is conveniently expressed by the brocard of the civil law, frustra petis quod mox es restiturus, if it can be shown that the appellants would have been entitled to get repayment of that portion of the month's hire which corresponded to the period after August 16 when the ship was taken away from them by the action of the Government, then it would be useless to give judgment to the respondents

(1) 2 Com. Cas. 258.

H. L. (E.) 1921

FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

Lord Dunedin.

for more than the sum corresponding to the period from the 10th to the 16th. And it is on these lines that the Courts below have proceeded, though they have held that inasmuch as no such right would have accrued to the appellants, judgment ought to be given for the full amount.

My Lords, I do not shrink from saying that I have found this question one of extreme difficulty, as to which my opinion has repeatedly wavered. It has been rendered all the more difficult by the very slight assistance which is to be derived from the opinions of the learned judges below. I do not say this by way of criticism ; it is rather a piece of evil fortune.

As to the first point, they were bound by the judgment of *Tonnelier*, and so far there is no more to be said.

As to the second point, it is not mentioned in two of the judgments, but I assume that the learned judges proceeded on the ground explicitly stated by Scrutton L.J.—namely, that they were bound by *Lloyd Royal Belge Société Anonyme* v. *Stathatos*. (1) They were so bound, and that prevented them doing what they would otherwise have done—arguing the case on its merits. Then, when I consider *Stathatos*, I am scarcely better satisfied. There is, indeed, a carefully argued judgment by Atkin J., but when I turn to the Court of Appeal the judgment is put on a ground which is either ill reported, as has been said by Lord Finlay, or is, I think, clearly erroneous. That ground is that you could only recover under the contract, and that as the contract is no longer existent owing to what is termed frustration, there is no basis on which you can reach payment. It is useless to cite the numerous cases which have recently arisen and have been decided, several of them in this House, as to what happens when the performance of a contract according to its terms is rendered impossible by vis major. It is nowhere laid down that the contract is non-existent. There is no liability in respect of non-performance in the future, but accrued rights remain untouched and enforceable. There is no better reductio ad absurdum of the other proposition than is to be found in the present case. If the contract is

(1) 33 Times L. R. 390; 34 Times L. R. 70.

non-existent for all purposes of recovering money under it then, inasmuch as the appellants here did not de facto pay anything on August 10, the respondents can get nothing from them now and no question of repayment arises.

The question must therefore, in my opinion, be thus approached: On August 10 the respondents were bound to pay a month's hire, on August 16 the further performance of the contract became impossible. Was there or was there not an accrued right on the appellants' part to get repayment of such portion of the hire paid on August 10 as did not, as we conveniently term it in Scotland by a word which is wanting in English, "effeir" to the period from August 10 to 16. The sheet anchor of the appellants' argument is the expression used by Rigby L.J. and the Master of the Rolls in *Tonnelier's Case* (1), that the payment in advance is "provisional"; coupled with the admission which had to be given by the respondents' counsel that had there been a delivery at a coal port in the United Kingdom in the ordinary course on the 16th that sum would have been recoverable. I confess I was much moved by that argument, but on further consideration it appeared to me that the word "provisional" might be too hard pressed. I do not think that by terming the payment "provisional" the learned judges meant to say that the payment in advance was not really a payment, but only a deposit, leaving the question of payment over. The payment in advance is truly payment, but it can only be a payment of what the contract says is earned. Now, the payment earned by the contract is freight for use till redelivery of the ship in terms of the contract; on delivery freight ceases; consequently the money paid in advance in so far as it does not represent freight earned became mere money had and received, and, as such, recoverable. This was the result in *Tonnelier's Case.* (1) Now, in the present case there was no redelivery in terms of the contract, and consequently freight in terms of the contract never ceased. In each and every case that was thought of there is a substantive provision for the ceasing of

(1) 2 Com. Cas. 258.

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Lord Dunedin.

freight. There is the case of redelivery (clause 5), there is temporary inefficiency (clause 12), there is loss of the steamer (clause 18). The addendum to clause 18, that hire not earned shall be returned, neither helps nor hinders the argument, for the right to get return is conceded when there is redelivery, and I take it would have to be conceded when there was a partial operation of clause 12. The case that has happened was not thought of, and consequently there is no provision for the cessation of hire in that event. No doubt the inability to redeliver is due to no fault of the appellants; that, however, has no effect one way or the other on accrued rights. The Coronation cases here come to be in point.

The situation, therefore, stands thus: The payment in advance has accrued and has been made good. A right to stop the hire after redelivery or during such temporary inefficiency, or after loss, has not accrued, for none of these events has happened; and no right has accrued in respect of an event which was not mentioned.

I proceed entirely on the words of the contract. The general consideration that hire is prima facie the consideration for use does not move me; the same might be said of bill of lading freight when payment stipulated for and made in advance cannot be recovered though the goods are never delivered owing to loss at sea.

For these reasons I think that the appeal falls to be dismissed, and I move accordingly.

LORD SUMNER. My Lords, in strictness the umpire's question, which has now to be answered, is concluded by *Tonnelier* v. *Smith.* (1) He states his opinion to be "that the French Marine are not, and were not on August 10, 1919, liable to pay a full month's hire of the steamer on that date, but are and were only liable to pay a fractional proportion of a month's hire from the 10th of August to the 16th of August," and leaves it to the decision of the Court to say whether this was right in law or not. Further, in reciting the issues raised between the parties and the submission

(1) 2 Com. Cas. 258.

made by the charterers, he confines himself to the words, "were not on the 10th of August," omitting any reference to present liability. Now *Tonnelier* v. *Smith* (1) decided that, if payment was not made, the remedy by lien was exercisable by the shipowner on the day on which payment of a month's hire was due in advance; that is to say, that the full month's hire was then due and payable. So far that decision would conclude the matter. The first question, therefore, is whether *Tonnelier* v. *Smith* (1) is either distinguishable or wrong; but the Courts below have allowed the case stated to be treated loosely, so as to raise the further question, whether by reason of events happening after August 10 and involving what the umpire calls "frustration" of the commercial adventure, the sum to be paid can be reduced to an amount representing the time from August 10 to August 16, and this accordingly forms the second question.

My Lords, *Tonnelier* v. *Smith* (1) has so long been acted upon in the time-chartering business and has been followed in such a multitude of settlements of ships' accounts, that, unless it is manifestly wrong, it ought not to be overruled. Personally, I think the issue in that case was rightly decided, but some sentences in the majority judgment—incautious perhaps and wanting in clearness—have been, as it seems to me, much misunderstood. In that case the ship had reached the port of redelivery, and there it was that a dispute arose in view of the high probability that the discharge would not occupy a month. The case of "frustration" of the further performance of the adventure was not before the minds of the Court of Appeal at all. To read the words "the payments in advance were to be provisional only and not final" as deciding, that in all events whatever, in the event of frustration as well as in that which was the origin of the actual dispute, a repayment could be claimed, if the use of the ship was not enjoyed for a full month, is, in my view, to disregard both the reasoning of the judgment and the occasion on which it was delivered. The charter contained express words applicable to the particular case and the Court

(1) 2 Com. Cas. 258.

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Lord Sumner.

of Appeal construed them. They were "at and after the same rate for any part of a month, hire to continue till her redelivery." They were held to be an express provision for a payment in advance, which was not final. True it was that in terms repayment was only stipulated for in that charter once, in another clause and in another event, namely, loss of the ship, but to give the charterer the security of a lien on a ship, which was lost, would be meaningless. Other cases of repayments to the charterer were evidently contemplated and the case before the Court, covered by the words above quoted, was one of them. The difficulty of reading this lien as meaning that the charterer can refuse redelivery of the ship and yet not be under a continuing liability for further hire is obvious, and lien on the ship in the strict sense he had none. In the present case also the ship never was out of the possession of the owners, whether chartered or actual. There may have been no demise to the chartered owners; there certainly was none to the charterers. The ship sailed for Australia in the same unchanged possession as that in which she arrived at Toulon. I reserve any opinion as to the meaning and effect of this so-called lien, but the use made of it by the Court of Appeal in *Tonnelier's Case* (1) is simple enough. The judgment goes on to dismiss the charterer's contention, that in the event which had happened all he had to pay was hire estimated pro rata, on the ground that the charter contained no provision for any estimate, clearly showing that the Court held the rights of the parties to depend on the actual provisions of the contract. If the Court had meant that in a time-charter all advance payments of hire are provisional or conditional, they need not have dwelt on the lien clause or have explained the object of the loss clause. To say that, apart from the circumstances of that dispute, the Court then held that any such payment is provisional merely, and that, if at the end of the period a less amount of hire proves to have been earned, the owner must account for the excess to the charterer, to my mind imputes to Lord Esher M.R. and Rigby L.J. a proposition

(1) 2 Com. Cas. 258.

equally irrelevant and wrong, for it means that they did not consider the rule expressum facit cessare tacitum applicable to a time-charter. Payment means payment. Without some provision, expressed or necessarily to be implied from the expressions used, there is no right to repayment except such as the law gives. Here there was no total failure of consideration but a partial failure only, for which in law no pro rata repayment could be claimed. The right to repayment, in the events which happened, has to be found in the charter, and the fact that, in one form of words or another, the charter provides for repayment in certain named events, is good ground for saying that in other events repayment is not provided for. This, in my view, is all that Rigby L.J. said or was warranted in saying, and it fails to carry the appellants home.

My Lords, it was ingeniously argued that *Tonnelier* v. *Smith* (1) might be distinguished from the present case, because this charter contains a provision that money in dispute is to be deposited in joint names, but I think there is no substance in the point. If a dispute arises, it must go to arbitration, and the party from whom a payment is claimed must, so to speak, pay it into court. This is the most that can be made of the clause; perhaps it means no more than this, that, if there is a sum received from strangers by one party, to which both lay claim, it is to be deposited in medio to abide an award. In no case can it mean that if one party disputes his liability to pay money to the other, he can deposit the money in joint names and so discharge himself from an actual obligation to pay according to the contract. The clause refers to security and procedure only, not to liability.

My Lords, it will not be disputed that the charter and the charter alone must be the source from which any right to a repayment or reduction of hire is to be derived. The umpire has found as a fact, that on August 16 further performance on either side was frustrated. The term may not be the best, and it has been doubted—though not in the most recent cases—whether "frustration" applies to a time-charter,

(1) 2 Com. Cas. 258.

H. L. (E.) 1921

FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

Lord Sumner.

when the chartered period has not expired and the ship has not been lost. The result, however, is plain. From August 16 both parties were released from further performance, but both remained bound to perform such things as they had become bound to before that date. What provision, then, does the charter contain?

There can be no doubt that on August 10 the full sum of 9250*l.* was due and payable in advance and it was not paid. The words applicable are these, "The payment of the hire shall be made . . . monthly in advance" and "the" hire (not merely hire) is 9250*l.* per calendar month and pro rata for any fractional part of a month, payable "as hire . . . until her redelivery to owners, as herein stipulated," that is at a United Kingdom coal port. No one could then tell for certain the date of redelivery. A strike of dock labourers at Toulon might cause such delay as to make another month's hire fall due on September 10. On the other hand the ship might be redelivered at almost any time after fourteen days, or might break down or be lost within the month. The charter provides for these three cases, but for the case of frustration, which happened, it makes no provision at all. The words "pro rata for any fractional part of a month" refer only to a period of time terminating with redelivery as stipulated and not to any other period. The period from the 10th to the 16th did not terminate with redelivery as stipulated. A portion of a month terminating with the loss of the ship and a period, the currency of which is suspended by a breakdown and renewed on further readiness for service, are expressly provided for elsewhere and otherwise. It is true that on August 10 such rights as these provisions involve were rights which the charterers were entitled to enjoy, but they were entitled to enjoy them only in the events upon which the charter makes them contingent. If the ship occupied only a fractional part of thirty days in reaching her port of redelivery and in being tendered to the chartered owners there, if she lost time from any breakdown within clause 12, if she was lost or missing, then, but not till then, the terms of clauses 5, 12 or 18, as the case might be, would

become applicable. In fact on August 16 further performance of this charter on either side became impracticable, because the ship was requisitioned, and the charter was silent about the consequences. The legal rights thereupon arising are those stated by Collins M.R. in *Elliott* v. *Crutchley* (1): "In the absence of any special provision made by the parties with reference to the contingency of further performance of the contract becoming impossible, moneys paid in accordance with the terms of the contract must remain where they are when that contingency occurs; the party who has paid them, and by the contract was bound to pay them, cannot recover them back; but, as regards future liability, the contract is at an end." I cannot see why these words should be less applicable to a case where the contingency has occurred during and not before the commencement or performance of the contract or what distinction can be drawn between the obligatory directions of the Shipping Controller, for which unexpected event this pre-war form of charter made no provision, and the unexpected cancellation of the Coronation Procession.

It is no doubt true that the object of payment in advance is to secure the chartered owner in dealing with a foreigner, but that is no measure of the meaning of the stipulation which requires it. I daresay that in some events to require payment in advance is stringent, but the debtor takes his chance and in most cases covers himself by insurance. This obligation cannot be measured by such considerations, nor is any special perspicuity necessary to the expression of it. In the case of prepaid bill of lading freight and of chartered freight for a voyage, paid in advance, the risk is run every day and the law is clear; the loss of ship and cargo next day leaves the money prepaid in the receiver's hands. The reason is because payment is to be "in advance"; it is not also stipulated to be "on account." The money is not deposited, it is paid. Here the charterers got for their money six days' service at any rate, and when, on August 16, the further service was frustrated, the chartered owners

(1) [1904] 1 K. B. 565, 568.

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Lord Sumner.

reserved all their rights and the ship's service ended at Toulon. This was the charterer's misfortune ; it was not the chartered owners' fault. The parties had made no provision for the event, and, if a court were to make compensation to the charterers at the chartered owners' expense by taking a mere proportion of a month's hire, several important stipulations would be overlooked and injustice would be done. Under this charter the charterer has to pay hire from the date, when the steamer is placed at his disposal, till he redelivers her at the stipulated port of redelivery in same good order as when delivered to him and not on a Sunday or legal holiday. The length of this period cannot be fixed exactly in advance and, therefore, all time charters have to be made with a certain elasticity in the charterer's interest. In this case the period was four months plus any further time needed to complete a voyage current on the expiry of the four months. It is a fallacy to suppose that this results in a hiring consisting of separate and disparate periods, to which different considerations apply. The period of hiring is one and continuous, though it is longer or shorter according as the ship is or is not on a voyage at the expiration of the four months, and, in fact, this last part of the hiring is expressed like the other to be "on the conditions herein stipulated." In this way the owners not merely get hire for the ship's use, but, under clause 3, they are freed from a large part of the costs of bringing her back to a convenient port of redelivery, such as coals, port charges, pilotages, tug assistance, etc. The relevance of this is that, if there were a simple refund of hire paid in advance, proportionate to the number of days during which the ship was not at the charterer's disposal because she had been requisitioned and the charter "frustrated," the owner would be returning too much, for he would be getting no compensation for the loss of the advantage of having her brought home in large part at the charterer's expense, although he himself was in no default under the charter.

My Lords, I would venture to ask this question : If clause 5 provides generally for a readjustment of a provisional advance

by repayment of hire not earned, or if the hire, which is to be paid in advance under clause 5, means only hire for an efficient vessel placed at the charterers' disposal and does not extend to hire for a vessel not placed at their disposal, why are the clauses as to breakdown and loss of the ship required at all? The former is otiose; the latter should have been confined to the words prescribing the date for presumption of the loss. I agree that, if at the date of prepayment the charterers had a general right to have their advance payment readjusted in all events, for any fractional part of the month during which the ship might not prove to be at their disposal from any cause, the subsequent frustration would not defeat that right, but I fail to see how such a meaning can be extracted from the words of the charter. The charterers were relieved from having to bring the ship back to England to a coal port of their selection; they had no more hire to pay, no more bunkers to provide, but that is all. The word "hire" does not mean a payment commensurate with user; indeed, it is expressly provided that hire is not recoverable, when the opportunity for using the ship fails because, though efficient per se, she is weather bound and so of no use to anybody. Where a fractional payment constitutes hire the charter says so; when advance payments are to be repaid, it says so; when it makes no provision in terms, none can be supplied by your Lordships. Where is there any provision for repayments in the event of frustration? The shipowner was thereby excused from earning his hire; why is he, nevertheless, required to repay it? The judgments of four learned judges of great experience in these matters have been given in favour of the respondents. After a careful re-examination of the matter I believe them to be in accordance with the current of authority in these matters for many years, and to be right.

LORD PARMOOR (read by LORD SUMNER). My Lords, this is an appeal from the order of the Court of Appeal of June 17, 1920, affirming an order of Bailhache J. to the effect that a full month's hire was payable to the respondents under the

H. L. (E.) 1921

FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

Lord Parmoor.

terms of a time charterparty, dated March 13, 1919, between the respondents as owners of the steamship *Ardoyne*, and the appellants as charterers. The order of Bailhache J. was made on an award, in the form of a special case, in an arbitration under the terms of the charterparty. The owners and the charterers submitted certain points of law to the umpire, but the only question now left in dispute is, whether the umpire was right in awarding that the French Marine were not on August 10 liable to pay a whole month's hire but were only liable to pay a fractional part thereof. It is not disputed that the commercial adventure, contemplated in the charterparty, was frustrated as from August 16, 1919, by the direction of the Shipping Controller, that the steamer should proceed to Australia, to carry from there a cargo of wheat for account of the Royal Commission on Wheat Supplies.

The charterparty in question is a time charterparty. The charterers, under clause 5, undertake to pay hire monthly in advance, in cash, in London, without discount until redelivery of the ship to the owners. Redelivery under the terms of the charter was made impossible after the frustration of the commercial adventure by the direction of the Shipping Controller. The provision "*pro rata* for any fractional part of a month" is a provision applicable when the ship has been redelivered at such time, or under such conditions, that an adjustment of the amount of hire is necessitated under the terms of the charterparty. In this sense the amount paid in advance is a provisional payment, and if this is the meaning of the decision in *Tonnelier* v. *Smith* (1), I am in agreement with the Court of Appeal in that case. It is necessary, therefore, further to consider whether at the date of the frustration of the contract any right of pro rata adjustment had accrued. It had not, I think, accrued either under the redelivery clause, the breakdown clause, or the loss of steamer clause. The ship was on voyage at the expiration of the period fixed by the charter, but, under clause 7, the charterers are to have her use at the

(1) 2 Com. Cas. 258.

rate, and on the conditions therein stipulated to enable them to complete the voyage; that is to say, on the payment of the monthly hire in advance, subject to any provisions in the charter for pro rata adjustment. The provision in clause 7, as to the deposit of money in dispute, has no application to the matters in dispute in the arbitration, and I cannot find that either party placed any reliance on this provision. There is no suggestion of a breakdown under clause 12, or of the loss of the steamer under clause 18. Under the terms of the charter there has been no redelivery of the ship within the terms of the charterparty, such redelivery being rendered impossible by the direction of the Shipping Controller, which frustrated the commercial adventure.

When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded ab initio, but the parties are released from further performance. Thus any payment previously made, and any legal right previously accrued, according to the terms of the agreement will not be disturbed, but the Courts will decline to construct a hypothetical contract by suggesting terms which were not within the intention of the parties when the contract was entered into. It has been pointed out that this principle may not in all cases provide an equitable settlement, but that there is no preferable alternative: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1); *Chandler* v. *Webster* (2); *Lloyd Royal Belge Société Anonyme* v. *Stathatos.* (3) It follows that the money paid in advance for the full month cannot be recovered back in respect to the part of the month after the frustration, unless the right to a pro rata adjustment had previously accrued. In my opinion no such right had accrued under the terms of the charterparty. The simple fact is that the parties at the time of the making the contract did not contemplate the contingency of a commercial frustration consequent on the order

(1) [1903] 2 K. B. 756.
(2) [1904] 1 K. B. 493.
(3) 33 Times L. R. 390; 34 Times L. R. 70.

H. L. (E.) 1921

FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ.

of a food controller, due to the outbreak of an European war, and made no provision to meet any such contingency.

The appeal should be dismissed.

LORD WRENBURY. My Lords, when the Ministry of Shipping intervened, there resulted two consequences—first, both parties were discharged from further performance of the contract, for further performance had been rendered impossible, and secondly, the charterer's obligation to pay hire until redelivery of the vessel at a United Kingdom coal port was at an end because such redelivery had been rendered impossible. Having stated these two consequences I have stated all the consequences resulting from the frustration of the contract. Existing rights remained undisturbed. The contract was not torn up. It was not dead—it was partially paralysed. Some of the contractual terms retained, others had lost their living force.

In *Lloyd Royal Belge* v. *Stathatos* (1) hire had been paid in advance and the contract was frustrated by the detention of the ship by the British Government. Pickford L.J. is there reported to have said that as a result of the intervention of the Government "the contract was at an end." And upon the question of the charterer's right to recover the hire paid in advance he is reported to have said that "the implication arising from" clause 21 in the charter "could only arise while the contract remained in existence. When the charter was put an end to, that implication did not arise. They could only recover the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision under which the money could be recovered." I doubt whether Pickford L.J. can be correctly reported. The report being only in the Times Law Reports will not have been revised by the judge, and I doubt whether he can have said that which is attributed to him and have laid down so general a proposition as is contained in the words I have quoted. If he is correctly reported I must say with all respect that I do not agree with that general

(1) 34 Times L. R. 70.

proposition. As regards rights existing at the time of frustration the contract is, in my judgment, not impaired.

To ascertain those existing rights I have to read and construe the contract. That which remains is, in my judgment, merely a question of construction.

The questions to be determined are, first, whether on August 10 or 16 the shipowner was entitled to sue the charterer for a full month's hire (what was at that time the existing right of the shipowner in this respect?); and, secondly, if he was so entitled whether the charterer could, in an appropriate state of facts, recover a proportion of the amount.

Hire is, prima facie, a payment made for user. This prima facie meaning may be displaced by provisions in the contract. The charterer may have agreed to pay for the expectation of user; or he may have agreed to pay whether he has user or not. I find that in this contract there are provisions that the charterer is not to pay if, in certain circumstances, he has not the user (see art. 12). This at first sight seems to imply that, except in the defined circumstances, he is to pay whether he has the user or not. The events, however, in which he is not to pay are confined to cases in which the ship is not in a condition efficient for user. If she is efficient, but time is lost by other causes, he is to pay. From these provisions arises an implication that hire in this contract means payment to be made for an efficient steamer whether the charterer has the actual user or not, but not an implication that it includes payment to be made for a steamer whose user has by frustration been made impossible. It does not follow, therefore, that in this contract the prima facie meaning of hire—namely, payment for user, is displaced.

Upon this question art. 18 is again instructive. If the steamer is lost, hire is not payable after the date of loss, and "hire paid in advance and not earned" is to be returned. Here is a plain indication that hire is not earned unless there be user or the opportunity of user.

Further, as regards the hire itself I look to see whether the hire is necessarily so much a month (neither more nor less),

H. L. (E.) 1921 FRENCH MARINE v. COMPAGNIE NAPOLITAINE D'ECLAIRAGE ET DE CHAUFFAGE PAR LE GAZ. Lord Wrenbury.

whether the use be for a month or less than a month, or whether the contract contemplates fractional sums for periods less than a month. The answer is that it does contemplate fractional amounts in some events at any rate. Under art. 5, the hire during the four months ending on August 10 is so much a month in advance, for any further period the hire is a fractional part to be calculated to the date of redelivery. For my purpose it is not material for the moment to inquire whether the particular case in which a fractional payment is to be due is this case or not. The point is that a fractional and not an entire payment is under some circumstances "hire" under this contract. A similar observation arises upon art. 7. In the circumstances there contemplated the hire is to be "at the rate" stipulated by the contract, i.e., at the rate of so much a month, and as the period of time for which the calculation at that rate is to be made may be uncertain provision is made for deposit in joint names until that question has been settled.

Lastly, by art. 21, the charterer is to have a lien on the steamer for all moneys "paid in advance and not earned." Upon this the following passage in *Tonnelier* v. *Smith* (1) is relevant: "The last provision, that the charterer was to have a lien on the ship for all moneys paid in advance and not earned, makes it plain, if it were otherwise doubtful, that the payments in advance were to be provisional only and not final, and would entitle the charterer to postpone delivery of the ship until the unearned payments were repaid."

With this I agree. And again, upon the question of construction it is not material that redelivery of the ship is not now possible.

These being the provisions of the contract the conclusion at which I arrive upon the question of construction is that "hire" here means payment due for an efficient vessel which the owner places at the disposal of the charterer whether from outside causes the charterer is able to make use of the efficient vessel or not. But does not extend to payment to be made for a vessel which the owner does not (because he

(1) 2 Com. Cas. 258, 265.

cannot) place at the disposal of the charterer; that during the time when the owner does not place an efficient vessel at the disposal of the charterer the hire is "not earned"; that the provision of art. 21 that the charterer shall have a lien on the ship for moneys "paid in advance and not earned" (however difficult this may be to apply practically having regard to the provision as to hire continuing to accrue until redelivery) shows that if the sum paid in advance turns out to be too large the charterer will have a right to recover.

Payment was not made on August 10 in advance—the question is whether the charterers are now liable to pay a full month's hire or a fractional part. It is not, I think, material to inquire whether the obligation was and is to pay a full month with a right of recovery of a proportionate part or to pay a fractional part. In either case the charterers, I think, are right in saying that the owners cannot demand and retain a full month's payment when the vessel was taken from the charterer during the currency of a month.

For these reasons I think that this appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 18, 1921.

Solicitors for the appellants: *Holman, Fenwick & Willan.*
Solicitors for the respondents: *William A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *July* 26.

C. T. COGSTAD AND COMPANY . . . APPELLANTS;

AND

H. NEWSUM, SONS AND COMPANY, LIMITED . . . . . } RESPONDENTS.

Arbitration—Award—Special Case for Opinion of Court—Final or Consultative Award—Practice—Appeal—Right of Appeal from Decision of High Court—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 7, 19.

Disputes under a charterparty were referred to arbitration and an umpire was appointed. The umpire by an award, which purported to be an award stated in the form of a special case, found that the owners were justified in withdrawing the steamer in consequence of the non-payment of hire, and that the measure of their damages was the charterparty rate of hire and expenses as per charterparty up to a certain date, and that the owners were guilty of a breach of the charterparty, the damages for which he assessed. Subject to the opinion of the Court, he found a balance of so much due to the owners. He also apportioned the costs of the arbitration between the owners and the charterers. Clause 21 of the award was as follows: "The question for the opinion of the Court is whether upon the true construction of the charterparty and the facts as stated by me, the decisions at which I have arrived are correct in point of law. If they be correct, my award is to stand, but if incorrect in any particulars, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the Court":—

Held, by Lord Buckmaster, Lord Sumner, and Lord Wrenbury, Lord Parmoor and Lord Carson dissenting, that this was not a final award stated in the form of a special case under s. 7 of the Arbitration Act, 1889, but was a special case stated for the opinion of the Court in the course of the reference under s. 19 of that Act; and that no appeal lay from the opinion of the High Court thereon.

In re Holland Steamship Co. and Bristol Steam Navigation Co. (1906) 95 L. T. 769 applied.

Shubrook v. *Tufnell* (1882) 9 Q. B. D. 621 not followed.

Decision of the Court of Appeal [1921] 1 K. B. 87 affirmed.

APPEAL from an order of the Court of Appeal (1) dismissing as incompetent an appeal from a decision of Bailhache J. upon a question submitted for the opinion of the Court in an arbitration between the appellants as owners of the steamship *Lord* and the respondents as charterers of the said vessel.

* *Present:* LORD BUCKMASTER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

(1) [1921] 1 K. B. 87.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

Bailhache J. upheld the award.

Upon an appeal from his decision the preliminary objection was taken that no appeal lay, inasmuch as upon the true construction of the award it was not a final award stated in the form of a special case under s. 7 of the Arbitration Act, 1889, but was a case stated for the opinion of the Court in the course of the reference under s. 19 of that Act and on that hypothesis no appeal lay from the decision of the High Court thereon.

The Court of Appeal, by a majority (Bankes and Warrington L.JJ., Scrutton L.J. dissenting), allowed the objection and dismissed the appeal.

1921. June 24. *Neilson K.C.* (with him *Jowitt*) for the appellants. The question is whether this is an award stated in the form of a special case under s. 7 of the Arbitration Act, 1889, or is a special case under s. 19 of the Act, in which case no appeal lies from the judgment of the High Court. In all essentials this award is a final award under s. 7. The judgment of the majority of the Court of Appeal proceeded on *In re Holland Steamship Co. and Bristol Steam Navigation Co.* (1) It is submitted first that that decision is wrong for the reasons stated by Scrutton L.J. and is inconsistent with *Shubrook* v. *Tufnell* (2); secondly that it is distinguishable from the present case, (*a*) because there was here a final decision that there was a breach of contract on the part of the owners, and (*b*) by reason of the difference of language in the clause in which the question for the opinion of the Court is stated. In the *Holland Steamship Case* in the event of either or both points being wrongly decided "the matter is to be remitted to" the arbitrators. Here the language is "I desire that the matter may be remitted back to me for reassessment of the damages." That is not a retention of the seisin of the case by the arbitrator but only a request that the Court may send it back if necessary. Here nothing is left open by the

(1) 95 L. T. 769; 23 Times L. R. 59. (2) 9 Q. B. D. 621.

H. L. (E.) 1921 C. T. COGSTAD & Co. v. H. NEWSUM, SONS & Co.

arbitrator but a question of figures. In *In re Knight and Tabernacle Permanent Building Society* (1) it was finally decided that no appeal lay from a decision of the High Court with regard to a question of law arising in the course of a reference under s. 19, the reason being that this consultative jurisdiction of the Court does not result in a decision which is equivalent to a judgment or order. [He also referred to *North Riding of Yorkshire County Council* v. *Middlesbrough County Borough Council.* (2)]

MacKinnon K.C. (with him *Le Quesne*) for the respondents. An arbitrator does not make a final award unless he says: If the Court decides A, I award so and so; if B, I award so and so. Unless he makes an award in both alternatives it is not a final award. In effect *Shubrook* v. *Tufnell* (3) is overruled by *In re Knight and Tabernacle Permanent Building Society.* (1)

Neilson K.C. replied.

The House took time for consideration.

1921. July 26. LORD BUCKMASTER. My Lords, by a charterparty dated April 8, 1916, and made between the appellants, as the owners of the steamship *Lord* on the one part, and the respondents as charterers of the vessel on the other, the said steamship was chartered for a term of six months from the date of delivery. The charterparty contained provisions that the captain should prosecute his voyage with due dispatch and exempted the owner from liability for damage from various causes therein specified, including negligence, default or error of judgment of the master. There was also the usual provision that, in case of dispute, the matter should be referred to the arbitration in London of two arbitrators and their umpire. On September 26, 1916, the vessel, after loading, left Liverpool on a voyage to Archangel in accordance with the instructions given by the respondents. The voyage was never

(1) [1892] 2 Q. B. 613, 618. (2) [1914] 2 K. B. 847.
(3) 9 Q. B. D. 621.

completed owing to the fact that the master, in anticipation of danger due to German submarines, delayed the ship, and, on November 2, the monthly freight due on October 19 being unpaid, the appellants withdrew the vessel from the service of the respondents. Disputes consequently arose between the parties, the appellants claiming for hire, war insurance and other expenses, and the respondents for loss incurred by withdrawal and delay. These disputes were referred to arbitration in accordance with the provisions of the charterparty. The arbitration was duly held, and, on November 21, 1919, an award was issued in the form of a special case. The whole question on this appeal is whether this award was a complete and final exercise of the power of the arbitrator, or whether it was partial and interlocutory, reserving powers which had not been exercised and which, in certain events, the arbitrator would be compelled to exercise in order to put a final conclusion to the dispute. The important difference of these two views is due to the provisions of the Arbitration Act. This provides by s. 7 that the arbitrator should have the power to state a final award in the form of a special case; but, by s. 19, power is also given to state a special case on any question at law at any stage of the proceedings. If the special case be stated under s. 7 it can be appealed from the judge who determines it to the Court of Appeal; but, in the latter case, the decision of the judge before whom the matter is first heard cannot be challenged. It is under this latter head that the respondents say that the present case falls. Consequently, they contend, the decision of Bailhache J., before whom the matter was first heard, is complete, and the Court of Appeal had no jurisdiction to entertain this matter. The Court of Appeal has taken this view, Scrutton L.J. dissenting, and it is from their decision that this appeal has been brought.

The whole difficulty is due to the ambiguous form of the award issued. It is stated upon its face to be an award and after a general recital contains the statement that the arbitrator had been requested to make an award in the form of a special case and it concludes with a final assessment of

H. L. (E.) 1921 C. T. Ögstad & Co. v. H. Newsum, Sons & Co. Lord Buckmaster.

costs. All this is properly referable to the idea that the award is a final statement under s. 7; but clause 21 modifies the effect of this language and gives rise to the difficulty. That clause finds its place in the award after a full examination of the facts. The arbitrator first states the history of the matter in considerable detail and sets out the findings of fact as they affect the construction of the charterparty in a series of conclusions in para. 19. He states that the voyage was abandoned on October 31 and that the owners were justified in withdrawing the steamer for non-payment of the hire, but that they committed a breach of clause 9, which provides that the captain should prosecute his voyage with the utmost dispatch. On these views he assessed the damage due to the owners and to the charterers respectively leaving a balance in favour of the owners of a sum of 1849*l.* 0*s.* 9*d.* He then concludes in these words: "(21) The question for the opinion of the Court is whether upon the true construction of the charter party and the facts as stated by me the decisions at which I have arrived are correct in point of law. If they be correct my award is to stand but if incorrect in any particulars I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the Court." The appellants contend that the qualified form of this clause is merely nothing but an expression of the arbitrator's wish that, if the Court thinks he has been wrong in a point of law, it should exercise the power under s. 10 to remit the award for the purpose of redetermining the amount of damage; they suggest that, in fact, this would only require a small and simple sum in arithmetic, and they finally point out that the clause which awards the costs of arbitration shows that the matter was complete.

I find myself unable to accept this view. The only way in which it is possible to ascertain what was the real effect of this award is to construe its language. Unless it can be found that, according to its terms, the powers of the arbitrator were so exercised that, in any event, his duties under the arbitration were ended, and that he reserved to himself no further power

in any event, then the award cannot be regarded as final. The precatory language of clause 21 is strongly relied upon by the appellants; but there was no need for any such statement at all if the award was intended to be complete. If the matter reserved was nothing but a mere calculation of figures already ascertained and which could not upon any interpretation of the law be altered it would then have been a simple matter for the arbitrator to have stated that in the event of his conclusion as to the construction of the charter-party being held to be erroneous, he had assessed the final figures in the manner suggested, or he might have left the matter entirely alone, leaving the Court, if it were necessary, to send it back for readjudication; or the parties themselves could, on that hypothesis, have settled the figures without further reference. The fact that he expressly desired that the matter should be referred back to him for reassessment of the damages is to my mind inconsistent with the view that his power to decide the amount of the damage, which was not in terms assessed, had been fully and effectually discharged.

In the case of *In re Holland Steamship Co.* (1), the circumstances were the same as in the present, excepting that the award stated that if the opinions given by the arbitrator were wrong, "the matter is to be remitted" to give effect to the true construction of the contract. I agree with Bankes and Warrington L.JJ. in thinking that the difference in language between that award and the present is immaterial, and I agree also with both those learned judges that the principle upon which that case proceeded was correct. The case of *Shubrook* v. *Tufnell* (2) is a case which arose on a discussion as to whether or not an appeal from a decision upon a special case the matter should take its place on the final or interlocutory list; but the Master of the Rolls, in deciding that it ought to appear in the final list, made a statement, upon which Scrutton L.J. places considerable reliance in arriving at his conclusion. In that case Sir George Jessel said, referring to the case of *Collins* v. *Paddington Vestry* (3), that

(1) 23 Times L. R. 59. (2) 9 Q. B. D. 621, 623.
(3) (1880) 5 Q. B. D. 368.

H. L. (E.) 1921 C. T. Cogstad & Co. v. H. Newsum, Sons & Co. Lord Buckmaster.

"the Court . . . . only held that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory. Here if we differ from the Court below, final judgment has to be entered for the Defendant, and there is an end of the action." He appears to assume that if an award is made in such a form that in one event a decision will make it final that constitutes a final award.

I am unable to agree with this view. It does not appear to me that an arbitrator has exhausted the duties he has undertaken if he makes an award that is final in one event alone and leaves open and undetermined what may happen in any other event, and desires that on the happening of that event the matter shall be sent back to him for completion. It makes no difference how much or how little of his original power as arbitrator is retained. If in fact from the award itself it can be seen that, in the exercise of the duties originally undertaken by him, the arbitrator desires, in certain circumstances, that further opportunity should be afforded for the final exercise of that authority the award cannot be regarded as final.

I think the judgment of the Court of Appeal is correct and that this appeal should be dismissed with costs.

Lord Sumner. My Lords, it is from the award itself and from the language, in which the umpire has expressed it, that we have to gather what he meant or more exactly what he did. The question is this: when he executed this award, did he end his umpirage by making a final award, imperfect in form it may be but exhaustive of his functions, or did he merely submit to the Court a question of law on the footing of such findings as he had already arrived at, the answer to which would decide whether he must continue to exercise his arbitral functions, in accordance with a right to do so which by the award he reserved to himself. Substantially all turns on para. 21. The prefatory words "having been requested to make my award in the form of a special

case for the opinion of the Court do hereby make my award accordingly," agree somewhat better with a final than with a consultative award, for they are quite suitable to the former while the latter, though not wrongly so expressed, would more naturally not be called " my award." I do not, however, think the words are sufficiently significant to modify the effect of para. 21, which in terms states what the relation of the umpire to the Court is and what question he submits to it.

The material words of para. 21 are "if they"—that is "the decisions at which I have arrived"—"are correct, my award is to stand, but, if incorrect in any particulars, I desire that the award may be referred back to me for re-assessment of the damages due in accordance with the decision of the Court." The best way for the appellants of reading these words is that adopted by Scrutton L.J.—namely, that the umpire therein requests the Court to exercise its powers of sending the case back to him, if, in its discretion, it thinks fit to do so, but this is open to the comment that, if that was what was meant, it should have been more clearly stated, or better still have been left to the Court and not stated at all. I think the natural meaning of the words is this : " On the question whether the shipowners are excused from liability for their captain's default, I hold in law that they are not, and have included in my award certain damages against them accordingly. I may be wrong in so holding, but have not hitherto thought it necessary to make up an alternative computation of the damages. I wish to be told if I am right or wrong. If I am wrong, I wish to have the opportunity of completing my award by finding what in that event I should still have to decide, though, if I have been right, it does not arise for decision." This accords with the words "for re-assessment of the damages," for the effect of reversing the umpire's decision upon this question of law would be more than a mere rectification of the arithmetic disclosed on the face of the award. The amounts dealt with by the umpire are not so stated in the award as to dispense with " readjustments " by some one, who knows more of the matter than the award itself tells the Court.

H. L. (E.) 1921 C. T. COGSTAD & Co. v. H. NEWSUM, SONS & Co. Lord Sumner.

My Lords, this construction seems plain but, if the words were ambiguous, I think that the result would be the same, for it should be presumed that the umpire meant to do, and so worded his award as to do, his duty, which was to decide all questions submitted directly or indirectly for his decision. This he would do only if he consulted the Court on the point of law, reserving the final award on the facts in the alternative till he had received a direction. I think the appeal fails.

LORD PARMOOR (read by LORD BUCKMASTER). My Lords, I agree with the opinion expressed by Scrutton L.J., in the Court of Appeal, and think that the appeal should be allowed. There is a right of appeal, unless the case stated by the umpire comes under s. 19 of the Arbitration Act of 1889. The determination of the appeal depends upon the construction of the document of November 21, 1919, signed by the umpire. The document is designated an award, and the umpire recites that he has been requested to make his award in the form of a special case for the opinion of the Court, and that he thereby so makes his award accordingly. It was argued that this recital was consistent with the statement of a special case, either under s. 7 or under s. 19 of the Arbitration Act, 1889. I cannot agree in this contention. The power given to an umpire under s. 7 is to make an award in the form of a special case for the opinion of the Court. This is in accord with the language of the recital. Under s. 19 there is no award. The umpire may at any stage of the proceedings under a reference state, or be ordered to state, in the form of a special case, for the opinion of the Court, any question of law arising in the course of the reference. This distinction is fundamental. The purpose of a case stated under s. 19 is to enable the umpire to obtain guidance during the pendency of the reference, in order to assist him in arriving at his decision. Although a case may be stated under this section at any stage of the proceedings, it cannot be stated after an award has been made. The language used by Bowen L.J., in *In re Knight and Tabernacle Permanent*

Building Society (1), has been accepted in all subsequent cases. "The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact." I think that the umpire, in the present case, did divest himself of his complete authority over the subject-matter of the arbitration, and that his intention to do so is clear on the construction of the document.

It is not necessary to go through the document in detail, but (inter alia) the umpire found that the owners of the ship had committed a breach of clause 9 of the charterparty, and assessed the damages for the breach as 4586*l.* 11*s.* 4*d.* He further found that, subject to the opinion of the Court of law, there was nothing due by the owners to the charterers, but that there was due by the charterers to the owners the sum of 1840*l.* 9*s.* 9*d.* in full settlement of all accounts. In respect of a claim made by the charterers for cash advanced by the captain he disallowed the amount, as the charterers had not produced satisfactory proof of such advance. These are decisions made by the umpire under the terms of the reference, and in respect of them he has discharged his duty as the judge of law and fact. Para. 21 is as follows: "The question for the opinion of the Court is whether upon the true construction of the Charter party, and the facts as stated by me, the decisions at which I have arrived are correct in point of law. If they be correct my award is to stand, but if incorrect in any particulars I desire that the award may be referred back to me for reassessment of the damages due in accordance with the decision of the Court." There can be no doubt as to the effect of this paragraph. In one alternative the award stands as the final judgment of the umpire, in the other alternative a desire is expressed that the award be referred back to the umpire for reassessment of the damages due in accordance with the decision of the Court. It was argued that it was not the intention of an umpire

(1) [1892] 2 Q. B. 613, 619.

H. L. (E.) 1921 C. T. COGSTAD & Co. v. H. NEWSUM, SONS & Co. Lord Parmoor.

to state a case under s. 7, because he had not dealt with one or more alternative assessments, which only become material if a decision at which he has arrived is not correct in point of law. I think that this contention cannot be maintained. I do not doubt the importance of the form in which a question or questions are submitted for the opinion of the Court, but it is only one of the contentions relevant to the construction of the document as a whole, and is not in itself a conclusive test. The umpire asks whether the decisions at which he has arrived are correct in point of law. If the Court agree in this view the umpire has once and for all divested himself of his authority over the subject-matter of the arbitration. I do not desire to place my decision on any meticulous analysis of the language used, and think the result would be the same, whether the umpire had expressed his desire that the award should be referred back to him in a certain contingency, or had used the language which was used in *In re Holland Steamship Co. and Bristol Steam Navigation Co.* (1) If an umpire intending to state a case under s. 7 states it in such a form as not to enable the Court to give a final decision on all the matters in issue, there is ample power under s. 10, of the Arbitration Act, to remit the matters referred, or any of them, to the reconsideration of the umpire. It would not be necessary to make such a remission if the Court agree that the decisions, at which the umpire has arrived, are correct in point of law. As a matter of convenience and economy, it may often happen that a long inquiry into alternatives will be avoided if, on one point, the decision of an umpire is upheld. I can see no reason why this form of procedure should not be adopted. One of the difficulties in arbitration practice before the Act of 1889, consisted in the want of an alternative procedure to the revocation of a submission. This alternative is supplied by s. 10. The last paragraph in the document is an award of the costs of the arbitration. This again is an important matter on which the arbitrator has divested himself of his authority. To award the costs of the arbitration is a necessary factor for finality, in an

(1) 95 L. T. 769.

award stated as a special case under s. 7 of the Arbitration Act, but is not consistent with the statement of a special case under s. 19, which is only a step in procedure during the pendency of the reference. In such a case the costs are in the discretion of the arbitrators, or umpire, and would naturally not be dealt with by him until he made his award. Subject therefore to the authorities, to which I propose to call attention, the document of November 21 signed by the umpire denotes, in my opinion, the intention of the umpire to state his award in the form of a special case, and negatives the suggestion that the umpire intended merely to ask the opinion of the Court in a case stated under s. 19.

The case of *Shubrook* v. *Tufnell* (1) raised the question whether a case stated for the opinion of the Court, which in the alternative was to be referred back to the arbitrator, and in which an order had been made for reference back to the arbitrator, was appealable. No doubt this case was before the Arbitration Act, and therefore the effect of s. 19 of that Act could not be considered, but it is an authority to show that under conditions similar to those in the present case, an appeal would lie, unless it is held that the arbitrator intended to proceed under s. 19. The decision was that of Jessel M.R., and Lindley L.J. concurred. The judgment says (2): "If we differ from the Court below, final judgment has to be entered for the defendant, and there is an end of the action." It makes no difference that under later procedure an award can be enforced by an order without the necessity of bringing an action. This case was further considered in *Bozson* v. *Altrincham Urban Council* (3), when the question arose whether an appeal from an order made in an action was an appeal from a final order. The case of *Salaman* v. *Warner* (4) was quoted to maintain the proposition that an order is not a final order unless it is one made on such an application or proceeding, that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Reference was also made to *In re*

(1) 9 Q. B. D. 621.
(2) 9 Q. B. D. 623.
(3) [1903] 1 K. B. 547.
(4) [1891] 1 Q. B. 734.

H. L. (E.) 1921 C. T. Cogstad & Co. v. H. Newsum, Sons & Co. Lord Parmoor.

Herbert Reeves & Co. (1) The earlier decision of the Court of Appeal in *Shubrook* v. *Tufnell* (2), which was not cited in *Salaman* v. *Warner* (3), and which appeared to be in conflict with it, was also called to the attention of the Court. In his judgment Lord Halsbury said that he preferred the earlier decision of *Shubrook* v. *Tufnell* (2), and thought that the order appealed from was a final order. In the same case Lord Alverstone C.J. takes as the real test whether the judgment or order, as made, finally disposes of the rights of parties. Applying this test to the present case Bailhache J. found that the award was correct, and the appeal is against a decision, which, as made, does finally dispose of the rights of the parties. The conclusion from these cases is that where one alternative may finally dispose of the rights of the parties, the fact that there are other alternatives, which may require further consideration, is not in itself a sufficient ground on which to found the conclusion that the arbitrator did not intend to make an award in the form of a special case, but only to ask the opinion of the Court for his guidance on the point of law. The case relied on by the respondents is *In re Holland Steamship Co. and Bristol Steam Navigation Co.* (4), in which Collins M.R. and Farwell L.J. held, that as the umpire had said the case was to go back, if either or both points had been wrongly decided, the case was under s. 19. Scrutton L.J., who was umpire in that case, retains the opinion that his decision was a final decision "as it was stated to be and certainly intended to be and not an interlocutory one," and that he did not intend to retain any seisin or conduct of the case. In the present case I agree with Scrutton L.J. that the umpire does not retain any control or conduct over the arbitration after the issue of the document of November 21, 1919. Any further reference to him would not arise, from the terms of the submission, but only in the event of the Court exercising its powers under s. 10 of the Arbitration Act. Bankes L.J. thinks that arbitrators would be well advised, when stating a special case, to state, on the face of the case,

(1) [1902] 1 Ch. 29.
(2) 9 Q. B. D. 621.
(3) [1891] 1 Q. B. 734.
(4) 95 L. T. 769.

under which section it is intended to be stated. I do not question the advantage of adopting this course of procedure. The umpire in stating the special case under appeal, has, in my opinion, clearly expressed on the face of the case, that it is intended to be stated under s. 7 of the Arbitration Act. It is on this ground that I think the appeal should be allowed.

LORD WRENBURY. My Lords, the alternatives are two. The one is that this is a final award—that the authority of the umpire is at an end—that he has bid farewell to the arbitration and is no longer umpire—although by an order under s. 10 he could be recalled to the office which otherwise he has vacated. The other is that this is a consultative award—that he has retained his hold over the matters submitted to his arbitration—that his authority is not over—and that he awaits the opinion of the Court before he resumes and concludes his duties. To determine which is the true view recourse must be had to the language of the award itself. The question turns, I think, upon the language of art. 21, not forgetting any other article in the document which may throw light upon the true meaning of art. 21. As I read art. 21 the umpire is here saying "I ask the opinion of the Court upon a definite question of law. If the answer is A then my award is to stand" (implying that in some other state of circumstances it is not to stand). "But if it is B my award is not to stand for I have by my award assessed the damages, and if the answer is B that assessment is not to stand. I shall have to assess the damages anew." If he reserves the power to assess the damages anew he can only assess them anew under the authority which is in him as umpire, and his office as umpire must be a continuing office. It is argued that the words "I desire that the award may be referred back to me" import not that he is retaining his hold upon his office, but that he is requesting the Court to make an order under s. 10 reviving his office. I do not so read them. I think the language of the article means "In event A I have, in event B I have not assessed the damages"

H. L. (E.) 1921

C. T. COGSTAD & Co. v. H. NEWSUM, SONS & Co.

Lord Wrenbury.

(which was the fact) "and in event B I must go on and assess them."

Art. 22 has given me some concern. The umpire there assesses the costs of the arbitration and directs their payment as to two-thirds by the owners and one-third by the charterers. It may be that his apportionment was based upon the damages as he had assessed them in case A, and it would not be unlikely that if the relevant case should turn out to be B he would desire to reconsider that. But it is not obvious or necessary that he should desire to retain the power to alter the apportionment which he had thought proper to make. I cannot, from the fact that he was committing himself finally as to costs, infer that he was concluding his office as regards the assessment of the damages in case B. I think that this was not a final award under s. 7, but an award under s. 19 and that there is no appeal. It results that, in my judgment, this appeal should be dismissed with costs.

LORD CARSON (read by LORD SUMNER). My Lords, I agree with the judgment of Scrutton L.J. in the Court of Appeal, and with the reasons upon which he has based it. The question is whether the award has been stated in the form of a special case for the opinion of the Court under s. 7 of the Arbitration Act, or whether the arbitrator has found it necessary under s. 19 in the course of the proceeding under the reference to consult the Court for his guidance before making a final award. Upon reading the award I am of opinion that the arbitrator intended to make and did make a final award—that he has decided all the questions which have been submitted to him or have arisen in the course of the reference, and finally that he has dealt with the costs of the arbitration, which he could only do in the event of a final adjudication upon the case submitted to him. It is true that in clause 20 the award is expressed to be made subject to the opinion of the Court upon any point of law, and that in clause 21 the arbitrator states that the question for the opinion of the Courts is whether upon the true construction of the

charterparty and the facts as stated by him the decisions at which he has arrived are correct in point of law. As the Court before whom the case stated came agreed with the arbitrator in his construction of the charterparty and the decisions at which the arbitrator had arrived, it became unnecessary to remit the award for any further consideration.

It was argued before this House that as the arbitrator had not decided the liability of the parties in the event of a different view being taken by the Court and had stated in clause 21 that if his decision was not correct in any particular he "desired" that the award might be referred back to him for reassessment of the damages due in accordance with the decision of the Court, the award could not be considered a final one. I agree with Scrutton L.J. that where the arbitrator expresses his final opinion in the form of a special case, he need not and in many cases he could not be expected to work out all the possible results which might follow from the various views that the Court might take, and indeed I think it was with a view to meeting such a difficulty that s. 10 of the Arbitration Act was enacted. The expression of his desire that under circumstances the award might be referred back to him does not in my opinion prevent the award from being a final one, as it is merely referring to the power given by s. 10 of the statute to the Court before whom the special case would come for decision. I am therefore of opinion that this appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 26, 1921.

Solicitors for the appellants: *Botterell & Roche.*

Solicitors for the respondents: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 July 28.

OWNERS OF STEAMSHIP CELIA . . . APPELLANTS;

AND

OWNERS OF STEAMSHIP VOLTURNO . RESPONDENTS.

Shipping—Collision—Damages—Loss proved in Foreign Currency—Rate of Exchange—Proper Date for Conversion into English Currency.

In an action arising out of a collision between an English ship and an Italian ship both ships were held to blame and the cross-claims for damages were agreed, subject to a question raised by the owners of the Italian ship as to the rate of exchange in respect of a claim calculated in Italian lire for detention during the period that the ship was undergoing repairs:—

Held, by Lord Buckmaster, Lord Sumner, Lord Parmoor, and Lord Wrenbury, Lord Carson dissenting, that the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date at which the detention occurred.

Di Ferdinando v. *Simon, Smits & Co.* [1920] 3 K. B. 409 followed.

Manners v. *Pearson* [1898] 1 Ch. 581 explained and distinguished.

Decision of the Court of Appeal [1920] P. 454n. affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Hill J. (1)

The action arose out of a collision which occurred in the Mediterranean between an English steamship, the *Celia*, and an Italian steamship, the *Volturno*. At the trial Hill J. found both ships equally to blame and referred the question of damages to the Registrar. The cross-claims for damages were agreed subject to a question raised by the owners of the *Volturno* as to one item of their claim, which was calculated in lire, as to the rate of exchange.

That question was whether in calculating the amount which the respondents, the owners of the *Volturno*, were entitled to recover from the appellants, the owners of the *Celia*, in respect of damages for loss of the use of their vessel the rate of exchange to be taken should be taken at the time the loss was incurred or at the time of assessment or payment.

* *Present:* LORD BUCKMASTER, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and LORD CARSON.

(1) [1920] P. 447, 454n.

The facts are stated in the report of the case before Hill J. and in the judgment of Lord Buckmaster. The Registrar held that the date upon which the rate of exchange should be ascertained was the date of payment. Hill J. held that the rate of exchange in respect of the claims for detention should be fixed as at the periods of detention, and the Court of Appeal, without delivering any reasoned judgment, affirmed this decision on the ground that the case was covered by a previous decision of the Court in *Di Ferdinando* v. *Simon, Smits & Co.* (1)

1921. June 21, 23. *Raeburn K.C.* and *Langton* for the appellants. The proper date for ascertaining the rate of exchange is the date of the judgment. This was so held in the case of breach of contract by Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (2) That decision was reversed by the Court of Appeal on the ground that there was no binding or effective contract, but the question as to the rate of exchange was not discussed. (3) However, in the later case of *Di Ferdinando* v. *Simon, Smits & Co.* (4) Roche J. resiled from his former opinion and held that the proper date was the date of the breach; and this view has been adopted by Bailhache J. in *Barry* v. *Van den Hurk* (5) and by McCardie J. in *Lebeaupin* v. *Crispin & Co.* (6) *Di Ferdinando* v. *Simon, Smits & Co.* has since been affirmed by the Court of Appeal (1) and this is really an appeal from that decision unless it can be distinguished on the ground that this is a case of tort and not of breach of contract. The appellants submit, first, that, whether the case be one of breach of contract or tort, the proper date is the date of judgment; secondly, that damages for tort stand on a different footing. The respondents are resident in Italy and proved their loss in Italian currency and upon a proper application of the principle of restitutio in integrum they should receive such a sum in pounds sterling as would produce the number of lire proved to have been lost and

(1) [1920] 3 K. B. 409.
(2) (1919) 25 Com. Cas. 63.
(3) (1920) 25 Com. Cas. 174.
(4) [1920] 2 K. B. 704.
(5) [1920] 2 K. B. 709.
(6) [1920] 2 K. B. 714.

H. L. (E.) 1921 S.S. Celia v. S.S. Volturno.

no more, but the judgments of Hill J. and of the Court of Appeal would give them more lire than they have lost. The amount of lire which the respondents should recover ought not to be made dependent upon a fluctuating rate of exchange. Further, in an action in tort the damages may go on increasing from the day upon which the tort is committed until the day they are ascertained, and they are not ascertained until they are assessed. Until the recent series of cases there does not appear to be any reported case in England where this point has ever been argued, much less decided. [They referred to *Scott* v. *Bevan* (1) and *Bertram* v. *Duhamel* (2).] *Manners* v. *Pearson* (3) assists the appellants' contention and it shows the extreme inconvenience which may arise from fixing the date of the breach as the proper date for ascertaining the rate of exchange. The view contended for by the appellants is that which prevails in the United States: *Marburg* v. *Marburg* (4); Story's Conflict of Laws, 8th ed., §§ 308, 311A; Sedgwick on Damages, 9th ed., vol. i., § 274.

Sir John Simon K.C. (with him *A. D. Bateson K.C.* and *Balloch*) for the respondents.

In an action for tort the English Court is concerned with nothing except with awarding in sterling the amount of the defendant's liability. It ascertains the rights of the parties and awards that which measures the loss at the time when the loss occurs. *Manners* v. *Pearson* (3) is really an authority against the appellants. All three judges in the Court of Appeal agreed that if that were an ordinary action for damages for breach of contract the plaintiff would be entitled as at the date of the breach, and the judgment of the majority proceeded, rightly or wrongly, upon the form of the action. The view of the majority was that, the action being an action for an account, it was an action for the balance found due on the taking of the account and not for the several items to be included in it, and that therefore the rate of exchange was to be fixed as at the date when that balance was ascertained. For the purpose of the present appeal there is no

(1) (1831) 2 B. & Ad. 78.
(2) (1838) 2 Moo. P. C. 212.
(3) [1898] 1 Ch. 581.
(4) (1866) 26 Md. 8.

difference between an action for tort and an action for breach of contract.

Raeburn K.C. replied.

The House took time for consideration.

1921. July 28. LORD BUCKMASTER. My Lords, on December 17, 1917, a collision occurred in the Mediterranean between the steamship *Celia*, which belongs to the appellants, and the Italian steamship *Volturno*, which is the property of the respondents.

The dispute as to liability for the collision was determined in this country in an action before Hill J., who decided, on July 22, 1919, that both vessels were to blame and referred the question of damages to the Registrar. The cross-claims for damages were agreed between the parties. The claims of the owners of the *Volturno* included one for loss due to the fact that the vessel was under hire to the Italian Ministry of Marine at all material dates, and that in consequence of her detention for the necessary repairs from December 25 to 30, 1917, at Gibraltar, and January 24 to February 18, 1918, at Newport News, deductions from her hire were made amounting to 304,418 lire. That the *Volturno* is entitled to damages under this head is admitted. But the question is, at what date ought the rate of exchange to be fixed, in order that those damages, which were originally assessed in lire, should be converted into sterling. The Registrar held that the date at which the damage was assessed was the right date, but Hill J. decided that the time when the actual loss for each detention was incurred was the correct period, and this view has been confirmed by the Court of Appeal.

It is suggested that special considerations may apply in regard to the particular circumstances in which this matter arises for determination, but I cannot see that any of these circumstances take this case out of the general rule, and it is the nature of that general rule which your Lordships are asked to consider and determine. There are only two possible dates put forward as the dates upon which the

H. L. (E.) 1921 S.S. Celia v. S.S. Volturno. Lord Buckmaster.

conversion can be made, the date when the loss was incurred and the date when the liability for the loss was determined. The suggestion that it might be the date of the writ was incapable of being supported and has not been argued. For the purpose of determining which of these two periods is correct it is essential to examine what it is that the judgment effects.

It is argued on behalf of the appellants that it should be considered as divided into two parts, the one declaratory of liability determined in lire and fixed at the date when the damage was incurred, and the other as a matter of mere machinery converting the lire into sterling at the date of the judgment.

To my mind that is not the true function and purpose of the judgment. A judgment, whether for breach of contract or for tort, where, as in this case, the damage is not continuing, does not proceed by determining what is the sum which, without regarding other circumstances, would at the time of the hearing afford compensation for the loss, but what was the loss actually proved to have been incurred either at the time of the breach or in consequence of the wrong. With regard to an ordinary claim for breach of contract this is plain. Assuming that the breach complained of was the non-delivery of goods according to contract, the measure of damage is the loss sustained at the time of the breach measured by the difference between the contract price and the market price of the goods at that date.

As was stated by Wright J. in the case of *Joyner* v. *Weeks* (1): "Many cases may be put in which it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed."

And as an instance of this proposition, he gives the alteration of market values. By the same process of reasoning a person who has committed a breach cannot have his liability increased by such a cause.

Similar considerations apply to an action for tort. In

(1) [1891] 2 Q. B. 31, 33.

cases where, as in the present, the damage is fixed and definite, and due to conditions determined at a particular date, the amount of damage is assessed by reference to the then existing circumstances and subsequent changes would not affect the result. If these damages be assessed in a foreign currency the judgment here, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the measure was properly made, and the subsequent fluctuation of exchange, one way or the other, ought not to be taken into account.

There is little authority upon the actual question until recent times, a circumstance due, no doubt, to the fact that fluctuations of currency did not formerly occur with the violent oscillations by which they have been marked in recent years. One of the earliest cases is *Scott* v. *Bevan*. (1) In that case judgment had been recovered in Jamaica for the sum of 1554*l*. 16*s*. 8*d*., current money of the island of Jamaica, and proceedings were taken here upon the judgment, the only question being whether the judgment should be converted into English currency, 100*l*. sterling being the equivalent of 140*l*. currency of Jamaica, or whether it should be taken at par, and it was decided that it ought to be estimated at the rate of exchange at the time of the judgment in Jamaica. The real question raised here does not appear to have been considered by the Court, a significant fact when it is remembered that Lord Tenterden was the presiding judge.

In the case of *Bertram* v. *Duhamel* (2) the point was not elaborately argued, and the quotation in the judgment at p. 217 is from the opinion of Lord Eldon in *Cash* v. *Kennion* (3), but this is not sufficiently explicit to afford real assistance.

The next case is of greater importance. It is *Manners* v. *Pearson*. (4) In that case an action was brought claiming an account of moneys due under a contract which provided for payment in Mexican dollars. Judgment in the action, declaring the plaintiff to be entitled to an account, was delivered on November 4, 1897, and the defendant in fact delivered an

(1) 2 B. & Ad. 78.
(2) 2 Moo. P. C. 212.
(3) (1805) 11 Ves. 314.
(4) [1898] 1 Ch. 581.

H. L. (E.) 1921 S.S. CELIA v. S.S. VOLTURNO. Lord Buckmaster.

account on November 13 of the same year, showing that a balance was due to the plaintiff in Mexican dollars on October 31, 1896. The question that arose was the date at which conversion from Mexican dollars into English sterling should take place. The plaintiff at first suggested that each sum of money should be converted into sterling at the date when it was shown to be due in the account, but he appears to have been willing to accept August 31, 1896, the date when the balance of the amount was shown to be due, while the defendants contended that the proper date was November 13, 1897, when the account was delivered.

It is at least remarkable that the actual date of the judgment was not suggested as the critical moment. The Court held, Vaughan Williams L.J. dissenting, that the right date was November 13, 1897. The foundation of the judgment depends entirely upon the fact that the claim was a claim for an account, and it appears to proceed upon the principle that the account was the real cause of action.

Lindley M.R. says (1): "To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter."

Rigby L.J. says (2) that the plaintiff's argument "proceeds upon an entire misapprehension of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account, and not for the several items to be included in it"; and he then says that the account "was not delivered until November 13, 1897, and, even if accepted on that date, could not have formed the basis of an order at an earlier period." This judgment clearly does not depend upon the view that the date of the judgment is the correct date for conversion, but rather upon the ground that the judgment is a judgment for something which is found due on taking the account, and that it is at the date when the account has been taken or delivered that

(1) [1898] 1 Ch. 589. (2) Ibid. 590.

the true liability is disclosed. In other words the balance of the account is treated as the foundation of the claim for judgment, and it is at that date that the conversion is to be made.

I am not prepared to accept this view, but it is not essential to determine that question in the present case. It is sufficient to say that the judgment certainly did not proceed upon the ground for which the appellants now contend. Vaughan Williams L.J., on the other hand, states in clear language the principle which the respondents say is correct. (1) He says: "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment," and he adds: "I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account." He thought, therefore, that conversion should take place in respect of each item as it was shown to be due, but as the plaintiff was willing to accept October 31, 1896, he also accepted that date as correct.

With the principle as he enunciates it I am in entire agreement, and I do not think that there is any expression in the judgment of the other learned Lords Justices to show that they disagreed. Their judgment rested, as I have shown, on their view as to the proper application of this principle to the circumstances of the action. The final authorities upon this matter are fortunately far from ambiguous. Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (2) decided that the rate of exchange should be taken as at the present time, meaning no doubt the date of judgment: but in a later decision of *Di Ferdinando* v. *Simon, Smits & Co.* (3), which was an action for breach of contract to carry goods from London to Italy and for conversion, the learned judge held that the proper measure

(1) [1898] 1 Ch. 592. (2) 25 Com. Cas. 63. (3) [1920] 2 K. B. 704.

H. L. (E.) 1921 S.S. Celia v. S.S. Volturno. Lord Buckmaster.

of damage was the value of the goods at the date when they should have arrived in Italy. He found the value in Italian lire and converted the sum into English currency at the rate of exchange on that date. This judgment was upheld by the Court of Appeal. (1) Bailhache J. in *Barry* v. *Van den Hurk* (2) also fixed the date for conversion as the date when the damages were properly measured, and McCardie J. in *Lebeaupin* v. *Crispin & Co.* (3) decided the same thing.

There is consequently a very formidable body of opinion in recent decisions against the appellants' contention, and the only authority to which they can refer in their support is the American case of *Marburg* v. *Marburg* (4) decided in 1866. There does not appear to have been any consideration of the question in the Supreme Court of the United States, and their Lordships are deprived of the assistance which would have been afforded had the matter been the subject of argument before that tribunal. The principle underlying the decision in the Maryland case appears largely to be due to the consideration of text-books on international law. In one sense the case undoubtedly affects international matters, but it does not necessarily follow that it involves consideration of international law. The real question must depend upon the true effect of a judgment in one country relating to damages that are measured in terms of a foreign currency, and into this international relations do not necessarily enter. Disputes similar to that in the present case could easily arise between two British subjects out of a purely British contract where the measure of damage was originally expressed in terms of a foreign currency; in such a case the English Court could and ought to measure the damages at the proper date, and then at that date convert the foreign exchange into English currency. There can be no difference in the principle when one of the litigants is not a British subject.

For these reasons I think that this appeal should fail, and should be dismissed, with costs.

(1) [1920] 3 K. B. 409.
(2) [1920] 2 K. B. 709.
(3) [1920] 2 K. B. 714.
(4) 26 Md. 8.

Lord Sumner. My Lords, a good deal of the effect of the appellants' plausible and ingenious argument is due to two fallacious suggestions, which have crept into and colour the whole of it. The first is that this is in substance a claim by the owners of the *Volturno* for a sum contractually due from the owners of the *Celia* in lire, and the other that, as they have elected to recover it here and not in Italy, the judgment recovered here is merely an attempt to put them in the same position as if a contract had been enforced in Italy.

The collision occurred on the high seas, and, subject to proof that the *Celia* was to blame, she became forthwith liable for the consequences. I may pass over the fact that the *Volturno* was also to blame, as not for this purpose affecting the matter. The right to compensation was complete then and there, though it might take time to discover all the consequences and to establish the extent of the mischief. That compensation was not recoverable in any particular currency, and, although for convenience of proof it would be severable into divers heads and items, it would be one gross sum, recoverable once for all. If there had been prospective or continuing damage the matter would have been more complicated, but I do not think that the principle would have been affected. The currency in which judgment would be given would depend upon the place in which the plaintiffs might find the defendants' ship so as to arrest her in proceedings in rem, or might succeed in serving process on the defendants themselves as the commencement of proceedings in personam. The essential thing to remember, which the appellants somewhat ignored, is that the sum in question here is only an item in a general claim for damages for a wrong done at sea, which was the subject of compensation just as naturally in British as in Italian currency.

The deduction of hire for the *Volturno*, which the Italian Ministry of Marine made from the sums payable by it to her owners under the charter, is, therefore, for the purposes of this case, mere evidence of damage inflicted on them by the collision. Though proved in a different way from the

H. L (E.) 1921 S.S. CELIA v. S.S. VOLTURNO. Lord Sumner.

physical damage to the ship, it is on the same footing, for it measures their loss, suffered by having the ship laid up, just as their repair bills measure their loss, suffered by having her side stove in. If the question of damage had not been simplified by an agreement between the parties, and if all the damages had gone to the Registrar and merchants for assessment together, no one would have thought of raising any question of the rate of exchange as at the date of the judgment. The cost of the temporary repairs incurred at Gibraltar would, I suppose, have been proved in sterling; if they had been done at Marseilles or Cadiz, they would have been proved in francs or in pesetas, just as the repairs at Newport News would have been proved in dollars, and in each case these currencies would have been converted into sterling, as at the date when liability for the several outlays accrued, because, when the damage is proved by the actual cost of repairing it, conversion of that cost forthwith into the currency with which the High Court deals is simply the process of completing that proof. When the owners of the *Volturno* came to their next item—namely, the money value of the use of the ship, of which the damage suffered in collision deprived them—why should any different rule as to exchange be applied? The charter furnished very precise evidence of the then value of the ship in use day by day, but it was evidence only and was not conclusive: see *The Argentino*, per Bowen L.J. (1) The owners of the *Celia* would have been at liberty to challenge it, if they could, and, if there had been no charter, the Italian owners might have shown what employment in Greece or in Norway could have been got, and so have measured their loss in drachmas or in kroner, instead of in lire. If the damages were such as need not be repaired at all, the whole loss might have been measured by the immediate depreciation of the ship in consequence of the collision, for the *Volturno's* owners would not be bound to repair her merely for the benefit of the owners of the *Celia*. In that case there would either be no question of exchange, if the evidence of sound and damaged values could be given

(1) (1888) 13 P. D. 191, 202–3.

in sterling, or, if there was any conversion into sterling, it would have been calculated at the rate current at the time of the collision.

My Lords, I am quite unable to understand why the owners of the *Volturno* should be subjected to any different rule merely because they have had the good sense to eliminate all questions that could be agreed, and to present in the most naked form the one question as to which the parties were in difference. All that was agreed was the number of lire actually deducted by the Italian Ministry of Marine during the periods when the *Volturno* was off hire, with the dates of the commencement and ending of those periods. Whether any adjustment was made for the expenses of running the ship while earning hire, which would be saved while she was off hire, does not appear. I do not gather that anything in the agreement was meant to vary any of the rights of the parties.

The appellants, however, completed their argument by saying that the Court, having ascertained how many lire the collision cost the owners of the *Volturno* in respect of detention, terminated its judicial functions at that point, and thereafter, in bringing into the judgment a certain amount of sterling to correspond with that finding, was merely making its decision available to the judgment creditors, as the best way in which they could be assisted by an English Court to get the lire to which they were really entitled. I think this again is a fallacy. For the purposes of a collision action it is the judgment that is the final judicial act, and it is the judgment that is the decision of the Court. The agreed numbers of lire are only part of the foreign language in which the Court is informed of the damage sustained, and, like the rest of the foreign evidence, must be translated into English. Being a part of the description and definition of the damage, this evidence as to lire must be understood with reference to the time when the damage accrues, which it is used to describe.

The matter may be tested in this way. Suppose that, as an incident of the collision, some seamen belonging to the

H. L. (E.) 1921 S.S. Celia v. S.S. Volturno. Lord Sumner.

Celia had taken possession on behalf of her owners of a parcel of Italian currency notes, the property of the owners of the *Volturno*, and that the former had received and kept it. The owners of the *Volturno* could have claimed damages for conversion of the notes or their return with damages for their detention, as they chose. In the first case the value of the notes would be taken and exchanged into sterling as at the date of the conversion, and as the foundation of the damages in the second case the same date would have been taken. Why should damage to the ship and her owners by collision be measured otherwise ?

No authority was forthcoming which really supported the appellants' propositions. There have been, during the past one hundred years, several English cases, in which these propositions might, and indeed ought to have been applied, if they are sound, yet very learned judges proved to be unconscious of their existence ; the best example is *Scott* v. *Bevan*. (1) The case in the Court of Appeal in 1898 (*Manners* v. *Pearson* (2)) really negatives them.

On the other hand considerable support for the view which I have ventured to express above is to be found in the judgment of the Privy Council in *Pilkington* v. *Commissioners for Claims on France* (3), which was pronounced by Sir William Grant M.R. Referring to acts of the French Revolutionary Government, whereby between 1793 and 1796 debts due by French subjects to British subjects and payable in France had been sequestrated, and to subsequent arrangements by treaty between England and France, under which compensation was to be made by France in respect of these acts, as for unjustifiable confiscation, and funds were deposited with Commissioners for that purpose, he is reported as having said : " We think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government ; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. . . . . The Republic themselves, in effect, confess

(1) 2 B. & Ad. 78. (2) [1898] 1 Ch. 581.
(3) (1821) 2 Knapp, 7, 19.

that no such decree ought to have been made. . . . . Therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrong-doer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50*d.* he does not make compensation by returning an assignat which is only worth 20*d.*; he must make up the difference between the value of the assignat at different periods." It is true that these observations are stated to be not strictly necessary to the decision (1) and that Dr. Knapp prints his report from notes by another hand, but I think these circumstances detract but little from the authority of the passage quoted.

As to *Marburg* v. *Marburg* (2), it is a case of a breach of contract to pay abroad a sum of money, which was the price of goods sold and delivered. It purports to follow *Scott* v. *Bevan* (3), and has no reference to damages for a wrong not arising out of a contract. Even so, there has been at different times much discussion in the United States as to the true rules governing such actions: Story's Conflict of Laws, 8th ed., §§ 308–315; Sedgwick on Damages, 9th ed., s. 274; but I think the question need not be pursued, as all such cases turn upon contractual obligations for payment of fixed or calculable sums in a foreign place and in the local currency, which have been put in suit in the Courts of the United States. For the same reason, while not intending to intimate any criticism upon it, I have not troubled your Lordships with any examination of the judgment in *Di Ferdinando* v. *Simon, Smits & Co.* (4) in the Court of Appeal. The case of *Delegal* v. *Naylor* (5) might seem at first sight to be in point for the appellants, for it began with a claim in trover for a parcel of local currency notes seized in Lima, but subsequently an agreement was made with the wrongdoers to give up the notes or pay their value as found by the officer of the Court, and, the notes having been lost at sea, the question came before the Court in the form of an application for directions as to the course he was to take under this agreement. I

(1) (1821) 2 Knapp, 21. (2) 26 Md. 8. (3) 2 B. & Ad. 78.
(4) [1920] 3 K. B. 409. (5) (1831) 7 Bing. 460.

H. L. (E.) 1921 S.S. Celia v. S.S. Volturno. Lord Sumner.

think that in substance the direction given was to find what it would cost to get notes of an equal face value in Lima, where they must be presumed to be worth what they appeared to be worth, and in any case it appears not to advance the present appellants' argument.

Finally it was urged that exchanging lire with sterling at the date of the judgment was the best way of eliminating speculative elements, and had the advantage of ensuring that in no case would a judgment creditor get more than the exact sum, to which he was entitled. Fluctuations in foreign exchanges inevitably introduce a speculative element into all transactions and affairs, and, unless the parties themselves have provided for this by some contract, the law must apply the same principles as if they had remained stable. Waiting to convert the currency till the date of judgment only adds the uncertainty of exchange to the uncertainty of the law's delays. The result may favour one side or the other, and there is no answer to this except that already discussed—namely, that the claimant's right is exclusively a right to lire, and would result in a judgment for lire, if only an English Court was, so to speak, competent to express itself in Italian. This is a mere assumption. After all the Court is an English Court and in theory decides the right as at the time when it arises, and does so in plain English. I therefore think that this argument also fails, and that the appeal should be dismissed.

Lord Parmoor. My Lords, the relevant facts may be shortly stated. On December 17, 1917, there was a collision in the Mediterranean between the steamship *Celia* and the steamship *Volturno*. Both vessels have been held equally to blame for the collision. The *Volturno* was temporarily repaired at Gibraltar, causing a detention of the ship from December 25 to December 30, 1915, and permanently repaired at Newport, causing a detention of the ship from January 24 to February 18, 1918. The *Volturno* was on charter to the Italian Government, and the vessel was off hire during each period of repair. The loss to the respondents from loss of hire during temporary repairs was agreed at lire 47,372.32,

and during permanent repairs at lire 257,046.40, but a difference arose as to the date at which the rate of exchange for Italian lire should be taken in order to ascertain the amount to be paid in English currency. The question for decision is, whether in calculating the amount which the respondents are entitled to recover from the appellants in respect of damages for the loss of hire of their vessel, the rate of exchange should be taken as that ruling when the loss was incurred, or as that ruling when the assessment of damage was ascertained ?

The answer to this question depends, not on any technical rule of English procedure but on the principle of insuring to the injured party, as far as possible, the full measure of compensation to which he is entitled. The argument on behalf of the appellants is, that, in an action of tort, damages are not ascertained until they have been assessed, and that if, in the interval between the tortious act which has occasioned the damage, and the ascertainment of its amount, there has been an alteration in the rate of exchange, the party injured will, instead of receiving the amount due to him as compensation, receive a greater or less amount, dependent on whether the rate of exchange has fluctuated favourably or adversely to his interest. I think that there would be no answer to this argument if the probable fluctuations in the rate of exchange between the date at which the loss is suffered and that at which the amount of damage is ascertained can be regarded as a relevant factor in determining what the amount of damages should be. For reasons hereinafter stated, there appears to me to be a fallacy in this contention. The argument for the respondents is that the amount of loss consequent on a tortious act, such as a collision at sea, falls to be determined at the date when it is suffered, and that the probability of subsequent alterations in the rate of exchange is immaterial, and that the risk of alteration in the rate of exchange is one which affects generally the financial transactions between the two countries, and is in no way connected either with the tortious act, or with the ascertainment of the amount payable to the injured party.

H. L. (E.)
1921
S.S. CELIA
v.
S.S.
VOLTURNO.
Lord Parmoor.

In my opinion, this contention is correct. The probability of the alteration in the rate of exchange is not an admissible factor in the ascertainment of the amount of damage, both on the ground of remoteness, and on the ground that it is a matter which affects generally all financial transactions, and is in no way connected with the tortious act for which the respondents are liable. To prevent misunderstanding, I desire to add that if the probability of alterations in the rate of exchange could be regarded as a relevant factor in ascertaining the amount of damage, it would be within the discretion of a Registrar to fix that rate, as at the date of the assessment, or at such other time as in his opinion might be reasonably adopted to obtain a fair figure.

The necessity for transferring into English money damages ascertained in a foreign currency arises in the fact that the Courts of this country have no jurisdiction to order payment of money except in English currency. Considerations which are irrelevant in the ascertainment of the amount of damage are irrelevant in fixing a rate of transfer, and I agree in the judgment of Hill J., as confirmed by the Court of Appeal. In truth the risk of a subsequent fluctuation in the rate of exchange is a risk which the parties themselves respectively incur. In its incidence it may, in any particular case, either mitigate or enhance the amount which, under a stable condition of exchange, would be payable to the injured party, but in itself it cannot affect the ascertainment of damages.

Of the many cases to which your Lordships were referred, the judgment of the Privy Council in *Pilkington* v. *Commissioners for Claims on France* (1) is most analogous to the present case. The judgment of Sir William Grant is based on the finding that a wrong act had been done by the French Government, and that restoration in a debased currency is not restoration for the wrong done, and that, if the wrongdoer received the assignats at the value of 50*d*. he does not make compensation by returning an assignat which is only worth 20*d*., but that he must make up the difference of the assignat at the different periods. If the assignat at the later date

(1) 2 Knapp, 7.

had been worth more than the value of 50*d.*, I think it would logically follow, on the judgment of Sir William Grant, that the wrongdoer would have made full compensation by returning such a number of assignats as would have replaced the numbers received, assessed at the value of 50*d.*

The other cases cited refer to damages on breach of contract, and not on tort. In the case of contract no doubt the parties may agree to make an alteration of exchange subsequent to the breach of contract an element in the assessment of damages, but in the absence of any such agreement, the same considerations would be applicable whether the action is based on tort or on contract. In the case of *Di Ferdinando* v. *Simon, Smits & Co.* (1) in the Court of Appeal, it was pointed out that fluctuations in value subsequent to the date of the breach were irrelevant considerations on the ground of remoteness, and that, where there is a market, the damages are the market value of goods at the time and place where they should have been delivered. I agree with the judgment of Scrutton L.J., and for the reasons given by him. The same view is expressed by Vaughan Williams L.J. in *Manners* v. *Pearson* (2): "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." In the same case Lindley M.R. says that no claim by the plaintiff to damages can be supported, and that the judgment and trial of the action limited the right of the plaintiff to an account of what is due to him from the defendants. He held that the plaintiff was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained. It is not necessary in this appeal to consider the principles applicable to the taking of an account, where no damages are claimed, but I do not think that this case supports an argument in favour of the

(1) [1920] 3 K. B. 409. (2) [1898] 1 Ch. 581, 592.

H. L. (E.) 1921 S.S. CELIA v. S.S. VOLTURNO. Lord Parmoor.

contention of the appellants. In his judgment Lindley M.R. adopts the principle expressed by Lord Eldon in *Cash* v. *Kennion* (1): "I cannot bring myself to doubt, that, where a man agrees to pay 100*l.* in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." I will not detain your Lordships by reference to cases which have already been fully dealt with.

My Lords, in my opinion the appeal should be dismissed.

LORD WRENBURY. My Lords, in my opinion this appeal fails. The action is for damages for tort. It is not a continuing tort. On December 30, 1917, and February 18, 1918, the defendants, the owners of the *Volturno*, were by the plaintiffs' wrong damaged to the amount of 47,372.32 lire in the one case and 257,046.40 in the other case, making together 304,418.72 lire. On June 8, 1920, the defendants' claim was agreed, subject to the question of the rate of exchange to be taken in assessing the loss. On December 30, 1917, the rate of exchange was 39.90. On February 18, 1918, it was 41.30. On June 20, 1920, it was 66.25. The order under appeal has taken 39.90 and 41.30 as the proper rates of exchange to be taken in measuring in English currency the agreed loss of 304,418.72 lire. The appellants say that this is wrong.

Your Lordships who have preceded me have already reviewed the authorities; it is unnecessary for me to do so again; more usefully can I state in my own words what I think is the true principle. Assume that a judge is sitting in July to try an action for damages for a tort committed on the preceding January 1. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on January 1 the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on January 1 the

(1) 11 Ves. 314, 316.

equivalent sum in British currency was (say) 7500*l.* Adjudge that the plaintiff recover against the defendant 7500*l.* There is no difference of principle arising from the fact that the loss is of lire as distinguished from (say) cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150*l.* Adjudge that the plaintiff recover from the defendant 150*l.* It would be nihil ad rem to say that in July similar cows would have cost in the market 300*l.* The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having, on January 1, deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows: the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

The argument to the contrary is that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed. That is true, but it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension—namely, that of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can

H. L. (E.) 1921 S.S. Celia v. S.S. Volturno. Lord Wrenbury.

be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act.

All the authorities are in favour of this view except the decision of Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (1), and the American decision in *Marburg* v. *Marburg.* (2) In *Di Ferdinando* v. *Simon, Smits & Co.* (3) Roche J. himself decided in favour of this view, preferring it (unless the cases could be distinguished) to his decision in *Kirsch & Co.* v. *Allen, Harding & Co.* (1) His decision in *Di Ferdinando* v. *Simon, Smits & Co.* was affirmed on appeal. (4) The present case is in substance an appeal from *Di Ferdinando* v. *Simon, Smits & Co.* In my opinion that case was well decided. No difference arises by reason of the fact that this is an action of tort while that was an action for breach of contract. There is here no continuing tort.

I think this appeal should be dismissed.

Lord Carson. My Lords, a collision occurred on December 17, 1917, between the *Celia* and the *Volturno.* At the trial of the action on July 22, 1919, Hill J. held both vessels equally to blame for the collision, and referred the question of damages to the Admiralty Registrar. The damages, however, were agreed on June 8, 1920, and the reference was, therefore, not held. The damages were agreed in lire and the question this House has to decide is as to the proper date upon which to calculate the rate of exchange in order to fix in English currency for the purpose of entering an English judgment the damages payable by the wrongdoer to a foreign claimant.

The Registrar decided that the date of payment, by which I understand him to mean the date at which the judgment is entered, is the time at which the rate of exchange should

(1) 89 L. J. (K. B.) 265; 25 Com. Cas. 63.
(2) 26 Md. 8.
(3) [1920] 2 K. B. 704.
(4) [1920] 3 K. B. 409.

be taken. He did so on the authority of a decision of Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (1), and he did so treating a decision of Bailhache J. as distinguishable on the ground that such decision arose in a case of breach of contract.

Hill J. reversed the decision of the Registrar, holding, on the authority of *Di Ferdinando* v. *Simon, Smits & Co.* (2) and other cases, that where the damages are assessed in a foreign currency they must, in entering an English judgment, be converted into English money at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed. The Court of Appeal simply affirmed this judgment, feeling itself bound by the decision in the case of *Di Ferdinando* v. *Simon, Smits & Co.* (2)

The *Volturno* was an Italian ship, and was under requisition to the Italian Government under a charterparty. By the terms of this charterparty hire was payable in Italian lire. By reason of the collision temporary repairs to the *Volturno* were made at Gibraltar, causing a detention of the ship from December 25 to December 30, 1917. Permanent repairs were made at Newport News, causing a detention of the ship from January 24 to February 18, 1918. The loss of the owners of the *Volturno* by reason of such detention was in respect of the first period, 47,372.32 lire ; and in respect of the second period, 257,046.40 lire ; and these two sums amounting to 304,418.72 lire, were claimed as damages, and were apparently included in the damages agreed.

It was contended by the owners of the *Volturno* that the rate of exchange should be taken either at the date of the writ or at the respective dates when the loss by detention was suffered, and Hill J. adopted this latter view.

It is to be observed, as I will try and show later, that there is very little authority, until we come to recent decisions, which can be held to lay down any rule on this subject, and

(1) 1 Lloyd's List R. 223 ; 25 Com. Cas. 63.

(2) [1920] 2 K. B. 704 ; [1920] 3 K. B. 409.

H. L. (E.) 1921 S.S. CELIA v. S.S. VOLTURNO. Lord Carson.

the fact that the respondents put forward alternative dates shows how uncertain the law is upon this subject. I would also add that all the cases so far as I know relied upon in the judgment of Hill J., were cases of breaches of contract, and no different rule for damages in contract or tort was suggested in the argument before this House. If I am right in the view I have taken of the matter, the reasons which impel me to that view will apply a fortiori to breaches of contract. The argument for the appellants in support of their contention that the date of the entry of the judgment is the proper date to fix the rate of exchange is shortly as follows: The foreign litigant has suffered, as is agreed, damages to the extent of 300,000 lire. On the principle of restitutio ad integrum, he is paid 300,000 lire; he gets all the damage he has suffered and it is all he would get if the claim was in Italy instead of in England, and although those damages have referred to and are answered on the basis of a loss at antecedent date, that affords no reason for awarding him either more or less owing to the fluctuations of the exchange one way or the other between Italy and England, which only means that the lira will buy more or less English money. The learned counsel for the appellants say further that the object, and the sole object, of translating the lire agreed upon into English currency is to comply with the requirements of English law—that an English judgment for damages must be for a sum of English money in order to make the damages accessible by execution to the foreign litigant. This principle, they say, would satisfy the dictum of Lord Eldon in *Cash* v. *Kennion* (1), where he lays down: "If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

I will deal shortly with the authorities later. On what principle are we asked to enter judgment for the owners of the *Volturno* for a sum of English money which will to-day produce a much larger sum of lire than that which they themselves have agreed upon, or, if the exchange had gone

(1) 11 Ves. 314, 316.

the other way and the value of the lire had appreciated, a sum of English money which would produce less than the agreed amount? It is said that the damages must be assessed with reference to the actual periods of detention. It is at that time that the owner suffers damages by loss of use. With that I entirely agree. But when it is added that it follows that that is also the date at which the exchange must be taken for the purpose of conversion with a view to entering judgment I do not follow the reasoning. I assume that in assessing the damages all the necessary adjustments would be made and elements of damage considered. It may be that, for instance, in the present case the temporary repairs at Gibraltar had to be paid in sterling, and it would, of course, follow that the amount of lire which the sterling represented at the rate of exchange at that date should form an item in the damages. Similarly, if goods had to be bought in the market in England to replace English goods not delivered under a contract with a foreigner, the date of such purchase would necessarily fix the rate of exchange in assessing the damages. But I do not think there is any connection between the fixing of the damages and the rate of exchange to be taken in relation to certain items thereof at certain dates, and the rate of exchange to be fixed for the purpose of entering judgment.

I am, therefore, of opinion that the contention of the appellants is well founded and that the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign currency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry of judgment is being made for the purpose of making the judgment available.

It may be said that where the rate of exchange has gone against the lira, the delay has prejudiced the applicant. I do not think that can be considered, as the rule which has been applied must plainly apply whether the exchange is adverse or otherwise. But in any event to assign this as a reason for the rule would be in reality to give damages for non-payment, which, except under special circumstances, are never awarded

H. L. (E.) 1921

S.S. CELIA v. S.S. VOLTURNO.

Lord Carson.

in our Courts. (For instance, see the judgment of Bailhache J. in *Barry* v. *Van den Hurk*. (1))

In *Manners* v. *Pearson* (2) Lindley M.R. says: "To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter."

I have examined the judgments delivered by the Court of Appeal in *Di Ferdinando* v. *Simon, Smits & Co.* (3), and also the judgments in *Lebeaupin* v. *Crispin & Co.* (4), and in *Barry* v. *Van den Hurk* (1), all decided in 1920, but although they all seem to me to lay down and assert the same rule as that upon which Hill J., following some of these judgments, acted and which I have already considered, I do not think the learned judges who decided them rest their judgments on any authorities, but rather assume that such a rule existed, or ought, as a matter of principle, to exist. The only case, apart from the recent authorities to which I have referred, which seems to me to give us any assistance is the case of *Manners* v. *Pearson* (2), from which I have already quoted.

Vaughan Williams L.J., no doubt in that case, laid down the principle which is contended for by the respondents in the present case, but he was a dissenting judge, and his judgment cannot be reconciled with the judgments delivered by the majority of the Court, Lindley M.R. and Rigby L.J.

Although that action may have to some extent turned on the form of the action, it is to be noted that judgment was given for an account on November 4, 1897; the account was delivered on November 13, 1897, showing an amount due to August, 1896, yet upon an application by the plaintiff claiming that the rate of exchange should be fixed at the date when the account showed the amount due—namely, August, 1896—the Court decided that the rate of exchange should be taken not as of that date but as of the date of the account under the judgment—namely, November 13, 1897.

(1) [1920] 2 K. B. 709.
(2) [1898] 1 Ch. 581, 589.
(3) [1920] 3 K. B. 409.
(4) [1920] 2 K. B. 714.

We have not been referred to any rule laid down in any English text writers, but under American law the rule, as I stated it, seems to prevail. Sedgwick, 9th ed., vol. i., s. 274, states the rule that, generally speaking, the exchange is to be estimated at time of payment, and in support quotes a number of American authorities, including the case of *Marburg* v. *Marburg* (1), to which we were referred, and which Sir John Simon admitted was, for what it was worth, an authority in favour of the appellants. Of course, such authorities are not binding in any way upon us, but they seem to me to be sound in principle, and I think the discussion of the question in Story's Conflict of Laws, 8th ed., §§ 308–315, leans to the same conclusion.

I would refer also to Westlake's Private International Law, 5th ed., s. 226, p. 315, where the learned author supports the view I have already indicated.

I am therefore of opinion that the arguments of the counsel for the appellants should prevail, and that the appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1921.

Solicitors for the appellants: *Thomas Cooper & Co.*
Solicitors for the respondents: *William A. Crump & Son.*

(1) 26 Md. 8.

[HOUSE OF LORDS.]

H. L. (I.)*
1921
July 28.

CLIFFORD AND O'SULLIVAN.

Martial Law—Military Court—Unauthorized Possession of Arms—Conviction and Sentence of Death—Jurisdiction—Prohibition—Appeal—Competency —"Criminal cause or matter"—Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 50.

By a proclamation dated December 10, 1920, the Lord-Lieutenant of Ireland proclaimed certain counties, including County Cork, to be under martial law. By a proclamation dated December 12, 1920, the Commander-in-Chief in Ireland declared the unauthorized carrying of arms to be punishable by death, and he authorized the general officer commanding in Cork to issue orders for the holding of military Courts as might be necessary. In May, 1921, the appellants, who were civilians, were tried by a military Court held by order of the General under the authority of the Commander-in-Chief on a charge of improperly carrying arms, and were convicted and sentenced to death, subject to confirmation. The appellants applied in the Chancery Division for a writ of prohibition against the military Court, the Commander-in-Chief, and the General commanding in Cork to prohibit them from proceeding further with the trial of the appellants or from carrying into execution any judgment against them, on the ground that the Court was illegal and had no jurisdiction to deal with the matter. Powell J. refused the application, and the Court of Appeal in Ireland dismissed an appeal from his order as incompetent upon the ground that it was an order made in a criminal cause or matter within s. 50 of the Supreme Court of Judicature Act (Ireland), 1877:—

Held, (1.) by Viscount Cave, Lord Dunedin, Lord Atkinson, and Lord Shaw of Dunfermline, Lord Sumner dissenting, that the order of Powell J. was not made in a criminal cause or matter within the Act, because the proceedings before the military Court were in no sense criminal proceedings, and that an appeal lay from that order; (2.) that prohibition did not lie, first, because the officers constituting the military Court did not claim to act as a judicial tribunal in any legal sense, and, secondly, because they were functi officio.

Dictum of Holt C.J. in *Chambers* v. *Jennings* (1702) 2 Salk. 553 considered.

In re Poe (1833) 5 B. & Ad. 681 followed.

Order of the Court of Appeal in Ireland affirmed in so far as it dismissed the appeal.

APPEAL from an order of the Court of Appeal in Ireland dismissing as incompetent an appeal from an order of Powell J.

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

The facts are fully stated in the judgment of Viscount Cave, but the following summary may be useful :—

By a proclamation issued on December 10, 1920, by Viscount French, the Lord-Lieutenant of Ireland, certain counties, including County Cork, were proclaimed to be under martial law.

By a proclamation issued on December 12, 1920, by Sir Nevil Macready, Commander-in-Chief in Ireland, it was declared that all arms, ammunition and explosives in the possession of civilians who were not in possession of a permit were to be surrendered by December 27, 1920, and that after that date any unauthorized person found in possession of arms, ammunition or explosives would be liable on conviction by a military Court to suffer death.

The Commander-in-Chief also appointed General Sir E. P. Strickland military governor of the martial-law area and authorized him to issue orders for the holding of military Courts in such manner as might be necessary.

In April, 1921, the appellants Clifford and O'Sullivan, who were civilians, were arrested by military forces near Mitchelstown, and on May 3, 1920, they were separately tried by a military Court held upon the instructions of General Strickland on a charge of being improperly in possession of arms and ammunition and were convicted and sentenced to death, subject to confirmation.

On May 10, 1921, the appellants applied in the Chancery Division that a writ of prohibition might issue directed to the military Court, and to Sir Nevil Macready and General Strickland (the respondents) to prohibit them from further proceeding with the trial of the appellants or from pronouncing or confirming any judgment upon them as the result of such trial or from carrying the same into execution or otherwise interfering with the appellants, on the ground that the military Court was illegal and had no jurisdiction to proceed with the trial or to adjudicate in any matters in relation to the appellants.

Powell J. refused the application.

Upon an appeal to the Court of Appeal in Ireland an

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN.

objection was taken by the respondents to the competency of the appeal, on the ground that the order of Powell J. was made in a criminal cause or matter within s. 50 of the Supreme Court of Judicature Ireland Act, 1877, and that consequently no appeal lay. The Court (O'Connor M.R., Ronan and O'Connor L.JJ.) upheld the objection and dismissed the appeal.

Upon the appeal to this House the same objection was raised by the respondents.

Three questions were raised upon the appeal: (1.) Whether the military Court had any jurisdiction to deal with the charge against the appellants; (2.) whether prohibition was the appropriate remedy; (3.) whether any appeal lay from the order of Powell J.

Having regard to the view of the case taken by their Lordships the arguments upon the first question are not reported.

he appeal was set down for hearing on the objection as to competency before cases had been exchanged upon the merits.

1921. June 16. *Serjeant Hanna K.C.*, (with him *E. S. Murphy K.C.* and *Lipsett*) (all of the Irish Bar) for the respondents in support of the objection as to competency. By s. 50 of the Supreme Court of Judicature Act (Ireland), 1877, which corresponds to s. 47 of the English Judicature Act, no appeal lies from any judgment of the High Court "in any criminal cause or matter." By the proclamation of the Commander-in-Chief in Ireland the carrying of arms by unauthorized persons was declared to be an offence punishable by death and, apart altogether from martial law, the carrying of arms was made an offence under the Firearms Act, 1920, and under reg. 9 AA of the Restoration of Order in Ireland Regulations made in pursuance of the Restoration of Order in Ireland Act, 1920. The question what is a criminal matter turns not upon any question of procedure, but upon the quality of the act itself. In *Ex parte Woodhall* (1) Lord Esher stated his opinion as the

(1) (1888) 20 Q. B. D. 832, 835.

result of the authorities that the words "criminal cause or matter" in s. 47 should receive the widest possible interpretation, and this view of the law has been expressly approved by the Lord Chancellor in the very recent case of *Provincial Cinematograph Theatres* v. *Newcastle-upon-Tyne Profiteering Committee.* (1) See also *Seaman* v. *Burley.* (2) Looking at the subject matter of the application to Powell J. it cannot be doubted that his refusal to grant a prohibition was an order made in a criminal matter. It may be objected that the Court which tried the appellants was not a Court at all, but was a mere committee of officers; but it was such a military Court as the Commander-in-Chief in a country where a state of war exists has authority to create, and upon this preliminary objection the test is, not whether the Court had jurisdiction to try the offence, but whether the subject matter of the proceedings was a criminal matter: *Rex* v. *Garrett.* (3) This matter must be either criminal or civil, and if it is not criminal what is it? *Rex* v. *Wiltshire Justices.* (4)

Sir John Simon K.C., Michael Comyn K.C., James Comyn, J. A. McCarthy (the last three of the Irish Bar), and *Richard O'Sullivan* for the appellants.

At the conclusion of the arguments in support of the preliminary objection the House ordered that the further hearing of the objection should stand over until the hearing of the case on the merits.

July 7, 8, 11, 12, 14. *Sir John Simon K.C.* and *Michael Comyn K.C.* (of the Irish Bar) (with them *James Comyn, J. A. McCarthy* (both of the Irish Bar) and *Richard O'Sullivan*) for the appellants (after contending that the military Court had no jurisdiction to try the appellants). As to the remedy. The jurisdiction which this military Court is claiming to exercise is a jurisdiction in its character of a military tribunal, though it is mistaken as to its powers, and that exercise of jurisdiction

(1) (1921) 37 Times L. R. 799; [1921] W. N. 219.
(2) [1896] 2 Q. B. 344, 347.
(3) [1917] 2 K. B. 99, 103.
(4) [1912] 1 K. B. 566, 572.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN.

can be challenged by means of a writ of prohibition. Although this was not a regular tribunal it had all the outward manifestations of a Court and it observed all the regular judicial forms. It purported to act as a Court, it was called a military Court in the proclamation of the Commander-in-Chief, and it followed the procedure of a Court Martial. Therefore it cannot be said that this was a merely executive act. This military Court was a tribunal which in certain circumstances and on certain occasions might have jurisdiction, but in this particular case, in the appellants' submission, it had none, in view of the fact that Parliament in the Restoration of Order in Ireland Act had specifically dealt with the matter in question. It is so far a Court that it ought to be prohibited. The writ of prohibition is the means by which the King in his High Court corrects tribunals of an inferior order who are usurping a jurisdiction which does not really belong to them: Short and Mellor's Practice of the Crown Office, 2nd ed., p. 252; Hale's History of the Common Law, 6th ed., p. 45; Comyns' Digest, vol. vii., p. 137, "Prohibition" A (A1.); Rolle's Abr., vol. ii., p. 313; Bacon's Abr., vol. vi., p. 564, "Prohibition"; Lloyd's Law of Prohibition, p. 8; *Mackonochie* v. *Lord Penzance* (1); *London Corporation* v. *Cox* (2); *Farquharson* v. *Morgan* (3); Prohibition will lie to a pretended Court: per Holt C.J. in *Chambers* v. *Jennings* (4), and it is a power which the Court should not be chary of exercising: per Brett L.J. in *Reg.* v. *Local Government Board.* (5) [They also referred to *In re Poe* (6); *Grant* v. *Gould* (7); *In re Local Government Board.* (8)] On the question whether the order of Powell J. was made in a criminal cause or matter, if it can be shown that this so-called military Court is only a pretended and usurping Court, which has no jurisdiction at all over these civilians, then this is no more a criminal cause or matter, in the sense in which the words are used in the Judicature Act, than it would be if

(1) (1881) 6 App. Cas. 424, 443.
(2) (1867) L. R. 2 H. L. 239, 254.
(3) [1894] 1 Q. B. 552, 556.
(4) 2 Salk. 553; also reported in 7 Mod. 125 and Holt, 597.
(5) (1882) 10 Q. B. D. 309, 321.
(6) 5 B. & Ad. 681.
(7) (1792) 2 H. Bl. 69.
(8) (1885) 16 L. R. Ir. 150, 159.

a mere body of amateurs assumed criminal jurisdiction. This is not a criminal proceeding, although the topic is what is called a criminal matter, because the charge is not made under the law of the land, but is made under the proclamation of the Commander-in-Chief; it is an unauthorized military proceeding. The term "criminal cause or matter" involves the existence of a properly constituted Court, and, in fact, there being no Court there can be no cause or matter. The question does not depend on the quality of the act but is a question of procedure: *Attorney-General* v. *Bradlaugh* (1); *Seaman* v. *Burley*. (2) Then what is the proceeding here? It is an application for a prohibition, which is a civil matter, and it is an application which may be made by any of His Majesty's subjects. [They also referred to *Reg.* v. *Fletcher* (3) and *Scott* v. *Scott*. (4)] Where civilians are tried and sentenced by a military Court which claims to act under judicial forms but which in fact has no authority to do so then prohibition lies to such pretended Court, but the question whether it lies or not is not a criminal cause or matter.

Serjeant Hanna K.C., and *E.S. Murphy K.C.* (with them *Lipsett*) (all of the Irish Bar) (after arguing the case on the merits). On the question whether this is a criminal cause or matter nothing that has been urged by the appellants has displaced the statement of the law by Bankes L.J. in *Rex* v. *Garrett*. (5) After referring to the distinction between a case in which the correctness of some decision given in a criminal cause or matter is in question and a case in which the question is whether the particular tribunal has any jurisdiction at all in reference to the criminal cause or matter upon which it is asked to adjudicate, he says that he cannot find that this distinction has ever received any recognition in the Courts and that he finds a number of cases which proceed upon the assumption that both classes of cases fall within the section. The strongest case showing that the existence of a Court is not necessary in order that the proceeding should be a

(1) (1885) 14 Q. B. D. 667, 693, 706.
(2) [1896] 2 Q. B. 344, 346.
(3) (1876) 2 Q. B. D. 43.
(4) [1913] A. C. 417, 443–4.
(5) [1917] 2 K. B. 99, 105–6.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN.

criminal case or matter is *Provincial Cinematograph Theatres* v. *Newcastle-upon-Tyne Profiteering Committee.* (1)

As to prohibition. Apart from *Chambers* v. *Jennings* (2) the writ has always gone to a Court or to a person exercising judicial functions, and *Chambers* v. *Jennings* itself was a case of a Court—namely a Court of Honour—which still had jurisdiction as a Court in certain matters. There is no analogy between the proceedings of this committee of officers carrying out the orders of the General Officer in command and the proceedings of a Court of law. They are not a Court but an advisory committee : *Tilonko* v. *Attorney-General of Natal* (3) ; *Attorney-General for Cape of Good Hope* v. *Van Reenen.* (4) Moreover, this committee has pronounced sentence and has performed all its functions and there is therefore no room for a writ of prohibition : *In re Poe* (5) ; *Chabot* v. *Lord Morpeth.* (6)

Sir John Simon K.C. replied.

The House took time for consideration.

July 28. VISCOUNT CAVE. My Lords, this is an appeal by Patrick Clifford and Michael O'Sullivan from an order of His Majesty's Court of Appeal in Ireland dismissing an appeal from an order of Powell J., a judge of the Chancery Division of the High Court of Justice in Ireland, who had refused an application by the appellants for a writ of prohibition. The application was made under the following circumstances : On December 10, 1920, the Lord-Lieutenant issued a proclamation whereby, after reciting that certain evilly disposed persons and associations with the intent to subvert the supremacy of the Crown in Ireland had committed divers acts of violence whereby many persons, including members of the Forces of the Crown and other servants of His Majesty, had been murdered and many others had suffered grievous injuries and much destruction of property had been caused,

(1) 37 Times L. R. 799 ; [1921] W. N. 219.
(2) 2 Salk. 553.
(3) [1907] A. C. 93, 94.
(4) (1904) A. C. 114.
(5) 5 B. & Ad. 681, 686.
(6) (1850) 15 Q. B. 446.

and further reciting that in certain parts of Ireland disaffection and unrest had been specially prevalent and repeated murders and attacks had been made upon members of His Majesty's forces culminating in the ambush, massacre and mutilation with axes of sixteen cadets of the Auxiliary Division, all of whom had served in the late war, by a large body of men who were wearing trench helmets and were disguised in the uniform of British soldiers and who were still at large, the Lord-Lieutenant by virtue of the powers him thereunto enabling proclaimed that the counties of Cork, Tipperary, Kerry and Limerick were and until further order should continue to be under and subject to martial law. On December 12, 1920, General Sir C. F. Nevil Macready, Commander-in-Chief of His Majesty's forces in Ireland, issued a proclamation whereby, after stating that martial law had been declared in the counties of Cork, Tipperary, Kerry and Limerick, and stating the reasons for such declaration, he made it known that the authorities named in the First Schedule thereto annexed (being the officers commanding certain divisions of His Majesty's Army) were thereby appointed military governors for the administration of martial law in the above counties, and that all persons should render obedience to their orders in all matters whatsoever. The proclamation proceeded as follows: "(*a*) All arms, ammunitions and explosives in possession of any person not a member of His Majesty's Naval, Military, Air or Police Forces, or who is not in possession of a permit, will be surrendered by the 27th December, 1920, to such persons and at such places as are named in the Second Schedule hereto annexed. (*b*) After the 27th December, 1920, any unauthorised person found in possession of arms, ammunition or explosives, will be liable on conviction by a military court to suffer death. . . . . (*d*) Note well: that a state of armed insurrection exists, that any person taking part therein or harbouring any person who has taken part therein, or procuring, inviting, aiding or abetting any person to take part therein, is guilty of levying war against His Majesty the King, and is liable on conviction by a military court to suffer death.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN. Viscount Cave.

(*e*) All law courts, corporations, councils and boards are hereby directed to continue to carry out their functions until otherwise ordered. (*f*) The Forces of the Crown in Ireland are hereby declared to be on active Service." The military governor appointed under this proclamation for the administration of martial law in Cork County and Cork City was Major-General Sir Edward Strickland, commanding the 6th Division.

On April 23, 1921, the appellants, who are civilians, were arrested by military forces near Mitchelstown in the County of Cork and were found with arms and ammunition in their possession, Clifford having upon him a six-chambered revolver loaded in five chambers, and O'Sullivan having an automatic pistol in a holster with seven rounds in the magazine. There was also found upon Clifford a written order signed "O. C." directing him to parade his section at 9 o'clock that night, at a place named. On May 3 the appellants were formally charged before certain officers sitting as a military Court under the proclamation of December 12, 1920, with being improperly in possession of arms and ammunition; and after a hearing, which was admitted to have been a perfectly fair one, and at which evidence was taken on oath, they were informed that they had been sentenced to death, the sentence being subject to confirmation. Thereupon application was made on behalf of the appellants to Powell J. that a writ of prohibition might issue directed to the above-mentioned military Court and to General Macready and Major-General Strickland to prohibit them from further proceeding with the trial of the appellants, or from pronouncing or confirming any judgment upon the appellants as a result of the trial, or from carrying into execution any such judgment or otherwise interfering with the appellants, on the ground that the military Court was illegal and had no jurisdiction to proceed with the trial of the appellants or to adjudicate in any matter in relation to them. The application was heard on affidavit evidence filed on behalf of the applicants and the respondents; and the learned judge, following a decision of a Divisional Court of the King's Bench Division in Ireland in a similar

case (*Rex* v. *Allen* (1)), held on the authority of *Ex parte Marais* (2) that a state of war existed in the above-mentioned counties of Ireland, and that where a state of war exists the civil Courts have no jurisdiction to interfere with the proceedings of the military authority. He accordingly refused the application. An appeal having been brought to the Court of Appeal, that Court held that, having regard to the provision in s. 50 of the Judicature Act (Ireland) that no appeal shall lie from a judgment of the High Court "in any criminal cause or matter," they had no jurisdiction to entertain the appeal and they accordingly dismissed the appeal on that ground without going into the merits. Thereupon the present appeal was brought.

On the petition of appeal to this House being lodged, objection was again taken to the appeal being heard on the ground that it was an appeal in a criminal cause or matter and this question came before your Lordships for consideration as a preliminary objection to the appeal. But on the matter being opened it appeared that it would be difficult for your Lordships to deal with the objection without being fully informed on the matters in dispute; and it was arranged that the preliminary objection should stand over to be heard along with the appeal. Cases were accordingly lodged and the appeal came on for consideration and was fully argued by counsel on both sides.

It is desirable to deal first with the preliminary objection; and for myself I entertain no doubt that the Court of Appeal had and this House has jurisdiction to entertain the appeal. Sect. 47 of the English Judicature Act, which is similar to s. 50 of the Irish Act in prohibiting an appeal from any judgment of the High Court "in any criminal cause or matter," has been considered in a number of cases, including *Ex parte Woodhall* (3), and a recent case in this House (*Provincial Cinematograph Theatres* v. *Newcastle-upon-Tyne Profiteering Committee* (4)); and it has been held that the words "judgment of the High Court in any criminal cause or matter" should be

(1) [1921] 2 I. R. 241.
(2) [1902] A. C. 109.
(3) 20 Q. B. D. 832.
(4) 37 Times L. R. 799.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN. Viscount Cave.

construed in a wide sense and as including any judicial decision with regard to proceedings the subject matter of which is criminal. But, however wide be the meaning to be attached to the words in question, they cannot, I think, apply to the decision of Powell J. in this case. No doubt that decision was given in a cause or matter, such matter consisting of the application to the learned judge for a writ of prohibition; but in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word "criminal." It must involve the consideration of some charge of crime, that is to say, of an offence against the public law (Imperial Dictionary, tit. "Crime" and "Criminal"); and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it (see *Reg.* v. *Fletcher* (1), per Amphlett J.A., and *Rex* v. *Garrett* (2), per Bankes L.J.), but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction. In *Attorney-General* v. *Bradlaugh* (3) Brett M.R. dealt with this point as follows:—

"The Judicature Act was dealing with procedure alone, and when the Judicature Act was passed there were forms of civil proceeding such as actions at law and suits in the Court of Chancery, and there were proceedings by indictments, there were criminal informations filed by the Queen's Coroner or by the Attorney-General, and there were criminal proceedings before magistrates. It seems to me that the Judicature Act recognised those divisions and intended that those which were clearly criminal proceedings, and were always recognised as criminal proceedings—those which I have enumerated—should not be brought before the Court of Appeal, but that all others should."

(1) 2 Q. B. D. 43, 47. (2) [1917] 2 K. B. 99, 105.
(3) 14 Q. B. D. 667, 693.

In the present case neither of the above conditions was fulfilled. The so-called "military court," whose proceedings were in question before Powell J., was not and did not claim to be a Court or judicial tribunal in any legal sense of those terms. It was not a Court Martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences; and its "sentences," if confirmed, will derive their force not from the decision of the military Court, but from the authority of the officer commanding His Majesty's forces in the field. Its true position was described by Lord Halsbury in *Tilonko* v. *Attorney-General of Natal* (1) on the following terms: "The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called 'courts martial,' administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory." And as the so-called military Court was not a Court in any legal sense, so the charges against the appellants which were brought before that body were not in any legal sense charges of crime. It is true that the unauthorized carrying of firearms and ammunition was in fact an offence against the law, both under the Firearms Act, 1920, and under the Restoration of Order

(1) [1907] A. C. 93, 94.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN. Viscount Cave.

in Ireland Regulations (see reg. 9 AA and the order of the competent military authority in Ireland, dated September 28, 1918, and continued in force by the Order in Council of August 13, 1920, para. 1, sub-s. 5): but the appellants were not charged with an offence against the Act or the Regulations, and the military Court could not and did not purport to deal with them under those enactments. They sat, not as a tribunal for hearing charges of crime, but as a military committee for considering a matter arising under the proclamation and advising the commanding officer thereon: and, although in the interest of the prisoners brought before them they followed the forms of law, their proceedings were in no sense criminal proceedings. I think it follows from these considerations that Powell J., in reviewing the proceedings of the so-called military Court, was not adjudicating in a criminal cause or matter and accordingly that an appeal lies from his decision.

But when the nature of the appeal is considered the question at once arises whether, on the assumption that the appellants are right in their view of the facts and of the law applicable to them, a writ of prohibition could have been granted; and as this question may be decisive as to the fate of the appeal, it is desirable to deal with it at once. The writ of prohibition has been described as "a judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior from usurping a jurisdiction with which it was not legally vested, or, in other words, to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction" (see Short and Mellor, Practice of the Crown Office, 2nd ed., p. 252). This definition is supported by the statements of text-writers (Bacon's Abr., "Prohibition," vol. vi., p. 564; Comyns' Digest, "Prohibition," vol. vii., p. 139; Hale's History of the Common Law, 6th ed., p. 45), as well as by the opinion of Willes J. in *London Corporation* v. *Cox* (1), and by that of Lord Blackburn in *Mackonochie* v. *Lord Penzance* (2), and according to this definition, the writ should

(1) L. R. 2 H. L. 239, 254. (2) 6 App. Cas. 424, 443.

only issue to a Court having some jurisdiction which it is attempting to exceed. It is true that in the report in Salkeld of the case of *Chambers* v. *Jennings* (1), Holt C.J. is reported to have said that "a prohibition would lie to a pretended court"; but in a fuller report of that case (7 Mod. 125) no such statement is to be found, and the tribunal there in question (the Court of Honour) certainly had some jurisdiction, which it continued to exercise for some years after the decision in *Chambers* v. *Jennings* (see *Blount's Case.* (2)) The same may be said of the Court of the Pope's Collector referred to in the *Vicar of Saltash's Case.* (3) It is true also that in *Reg.* v. *Local Government Board* (4) Brett L.J. expressed the opinion that the Court should not be chary of granting prohibition, and that wherever the Legislature entrusts to any body of persons, other than the superior Courts, the power of imposing an obligation upon individuals, the Court ought to control those persons if they attempt to go beyond the powers given to them by Act of Parliament; but even if this view be accepted, it cannot cover the case of a body of persons to whom no such powers have been entrusted either by Parliament or by the common law. It is unnecessary to decide whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments; but, however that may be, there is no precedent for the issue of the writ against a body which has no statutory or common law authority to do either, and which claims no such authority. In the present case the body which it is sought to prohibit, though called a military Court, neither possesses nor claims any such authority. Its legal position has been sufficiently defined in the above observations with regard to the right of appeal, and it is plain that it is in law not a Court or judicial tribunal of any kind. Nor does it claim to hold any such position. In the affidavit of Mr. Skinner, the solicitor for the appellants, upon which the application for a writ of prohibition was founded, the

(1) 2 Salk. 553.
(2) (1737) 1 Atk. 295.
(3) 2 Rolle's Abr. 313.
(4) 10 Q. B. D. 309, 321.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN. Viscount Cave.

deponent, referring to the officers before whom the appellants had been charged, says: "The said officers did not purport to act under any commission from His Majesty to try prisoners, or under any statutory or common law authority or as a court martial. They purported to act merely as officers carrying out instructions from Major-General Strickland, the General Officer Commanding at Cork"; and this statement correctly describes the position of the officers in question as defined both by the appellants and by the respondents, and makes it plain that those officers did not purport to act as a Court in any legal sense. If so, however wide a view may be taken of the power of Courts to grant prohibition, prohibition will not lie in this case. A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail (see *In re Poe* (1) and *Chabot* v. *Lord Morpeth*. (2)) What the appellants really desire is an order restraining General Macready and General Strickland from confirming and carrying out the sentences; and it is clear that as against these officers, who are in no sense the officers or agents of the military Court, prohibition could not be granted.

My Lords, these considerations are sufficient to show that this appeal must fail; and this being so, I do not think it either necessary or desirable to discuss the important questions of constitutional law which have been argued on the assumption that prohibition might lie. Your Lordships were informed that in other cases applications for writs of habeas corpus have been made on grounds similar to those which are put forward in this case and have been refused, and that appeals from those refusals are pending before the Court of Appeal in Ireland. If your Lordships should agree with the view that I have expressed as to the competency of an appeal in cases of this character, those appeals will shortly

(1) 5 B. & Ad. 681. (2) 15 Q. B. 446.

come before the Court of Appeal in Ireland for decision, and it is, I think, undesirable that your Lordships should prejudice those appeals by an expression of opinion which is unnecessary for the decision of the appeal now before the House. The dismissal of this appeal on the ground that prohibition does not lie will, of course, not prevent the appellants from applying for writs of habeas corpus if they should be so advised; but on the question whether such an application could properly be granted I express no opinion.

For the reasons already given I think that this appeal fails and should be dismissed, and I move your Lordships accordingly.

My Lords, my noble and learned friend Lord Dunedin, who is unable to be present, concurs in the opinion that this appeal should be dismissed on the ground that a writ of prohibition cannot be granted.

LORD ATKINSON. My Lords, I thoroughly concur with the judgment that has just been read by my noble and learned friend on the Woolsack, as to both points on which that judgment is based.

LORD SHAW OF DUNFERMLINE (read by LORD ATKINSON). My Lords, I concur in the judgment of the noble and learned Viscount on the Woolsack. I think the case to be appealable, it not having reference to a criminal cause or matter; and I think that the procedure by way of writ of prohibition was mistaken procedure, prohibition being directed to what was not a Court at all. I therefore think it to be unnecessary to decide other matters affecting the merits of the case and raised in argument. These matters were of high constitutional import, and they included questions of whether the legislation of last year providing for a legal element in tribunals to be set up under martial law, and restricting the maximum punishment to penal servitude for life, bears upon the question of the exercise of the punitive powers of the military authority. Upon these points which may be raised in a competent form

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN.

in regard to applications for habeas corpus I scrupulously refrain from expressing any opinion whatsoever.

LORD SUMNER. My Lords, the question on the preliminary objection is whether the appeal, taken to the Court of Appeal in Ireland, was in a cause or matter which was criminal, or was in one which was not criminal, the "matter" being in either case the decision of Powell J. to refuse the writ of prohibition, for which application had been made to him on behalf of the appellants. For purposes of procedure, and particularly for the purpose of defining the appellate jurisdiction of the Court of Appeal, the Irish Judicature Act of 1877 adopts this as an exhaustive classification. For practical purposes I do not know of any affirmative descriptions of cases that can be opposed to criminal matters in this connection except civil matters and ecclesiastical matters, and, the latter being insusceptible of any doubt, the antithesis comes virtually to be that of criminal and civil. So it has long been taken to be: (see per Lord Esher M.R. in *Ex parte Woodhall* (1), per Kennedy L.J. in *Rex* v. *Wiltshire Justices.* (2))

An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject matter dealt with on the application. The same is true of certiorari (*Reg.* v. *Fletcher* (3)) and of habeas corpus (*Ex parte Woodhall.* (4)) Nor is there anything peculiar about prohibition for this purpose. Prima facie a writ of prohibition is one to be directed to an inferior Court, its members and officers; habeas corpus on the other hand is not specially concerned with the jurisdiction or officers of an inferior Court, and therefore in habeas corpus no such question determines the issue of criminal or not criminal for the purpose of an appeal. I think the real test is the character of the proceedings themselves which are the subject matter of the particular application, whatever

(1) 20 Q. B. D. 832, 835.
(2) [1912] 1 K. B. 566, 572.
(3) 2 Q. B. D. 43.
(4) 20 Q. B. D. 832.

it be, that constitutes the cause or matter referred to. Can it be, when an inquiry is held under regular forms of criminal judicial procedure into the commission by accused persons of acts, which could lawfully be charged as crimes before another body, and the result of the inquiry on conviction may be a sentence of death, that this is not an inquiry of a criminal character? If it be of a criminal character, an attempt to obtain its prohibition, whether it fails or succeeds and on whatever ground, must be of a criminal character likewise. If the body, against which the writ was sought, was a Court having some legal authority and competent to try some crimes but not to try these accused persons or to try them for the crime with which they were charged, it is clear that the application for a prohibition would be a criminal matter. The line of authorities summed up in *Rex* v. *Garrett* (1) seems to me to establish this, and the difference between such cases and the present is one of degree only and not one of kind. This case may be a little clearer and the usurpation of jurisdiction a little more flagrant, but it is the same kind of usurpation if any—namely, a usurpation of a right to try the issue which it in fact does try. Whether there is no right or merely not enough, cannot matter. Again, where everything else is the same, why does that, which would constitute a criminal matter, if the parties prohibited possessed other jurisdiction but not the relevant jurisdiction, become a matter not criminal at all, because they possess no jurisdiction, not even a jurisdiction which is irrelevant? How is the result affected merely because, the accused being in fact guilty of a legal crime, as the appellants by their acts clearly were, the charge against them, based on those acts, was so framed as not to allege a breach of common or statute law? Such a distinction, instituted for the mere purpose of defining the right of appeal, is wholly arbitrary. It is quite inconsistent with the view that the real antithesis is of criminal matters and civil matters. No authority is cited for it, unless it be the words "all others should," which conclude the quotation from *Attorney-General* v.

(1) [1917] 2 K. B. 99.

H. L. (I.) 1921 CLIFFORD AND O'SULLIVAN. Lord Sumner.

Bradlaugh (1) made by the noble and learned Viscount. The effect of the passage appears to be that no matter is a criminal matter, except one of those enumerated earlier in the same passage—namely, proceedings by indictments, criminal informations, and criminal proceedings before magistrates. If so, it is defective as a complete statement of the law. I do not understand it to be questioned that an application for a writ of prohibition to a true court-martial, dealing with acts which were in themselves breaches of the ordinary criminal law, would be a criminal matter.

My Lords, I would further draw attention to the result of holding such a view. Suppose Powell J. had granted the writ of prohibition as to an inferior Court exceeding its jurisdiction, if indeed it had any at all; what then would be the position of the Court of Appeal? Either it must investigate and review the decision of Powell J. that there was an inferior Court acting in excess of its jurisdiction, in order to determine whether the matter was not criminal or was criminal and whether it was appealable or not appealable, or it must refuse to entertain the appeal from him, because ex facie it was a criminal matter and further investigation would be incompetent under s. 47. In the one case it would virtually hear an appeal which it might be incompetent to hear, and in the other it might be precluded from hearing an appeal which ought to succeed because the original decision was erroneous. I regret that I am unable to find any authority, hitherto decided, to support the two conditions which the noble and learned Viscount has laid down, and I think that the words of s. 47, the tenor of the authorities, and the practical working of this statutory definition alike show that the test must be the general quality of the subject-matter, against which the proceeding in question—in this case the application for prohibition—was directed. I am, therefore, of opinion that the preliminary objection succeeds or, which amounts to the same thing, that the judgment of the Court of Appeal in Ireland was right.

(1) 14 Q. B. D. 667, 693.

As the House is not agreed upon this initial question, I think it must be as proper for one, who with due diffidence thinks the appeal incompetent, to express his opinion on further questions in the appeal, as it is for those who hold the appeal to be competent to proceed (as indeed they cannot but do) to deal with it further. In any case I should not wish by silence either to seem to shirk other difficult questions, or to cast doubt on opinions with which I agree, nor ought I to withhold from your Lordships any assistance that I can render, however small. What authority, if any, attaches to any opinion which I thus express, I leave to others to decide on a future occasion.

It is common ground that the military Court in question here is a Court in name only ; that is, that it is not constituted by virtue of statute or of the common law, and that it is the creation of and is responsible to the competent military authority. The fact that it conducted itself with fairness, humanity, and care is not disputed, but it is a circumstance which, though honourable in itself, somewhat obscures the precise character of the Court as an extra-legal, I do not say an illegal, institution. It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all. Many abridgments and text-books of considerable authority were cited for the proposition that a writ of prohibition will issue to a "pretended" Court, but they all seem to rest on a dictum of Holt C.J. in *Chambers* v. *Jennings* as reported in 2 Salk. 553. Of the other two reports of this case neither contains the words which Salkeld gives. In the report in Holt, p. 597, the words are "doubted whether there was or could be any such court," a deliberately supercilious allusion to the Court of the Marshal, which, though then moribund and undermined in its authority because constables were no longer appointed, still continued to exist for some years afterwards. The report in 7 Mod. 125, which is a full one, assumes the Court of Honour to be an existing

H. L. (I.) 1921 — CLIFFORD AND O'SULLIVAN. — Lord Sumner. —

Court and omits altogether any such passage as that relied on. Clearly, if ever uttered at all, it was unnecessary to the decision and has never been followed. I do not think that, in spite of these passages, it would be right to issue a writ of prohibition, as to an inferior Court, in a case where, as in this case, it is admitted that there is no Court properly so called, and no legal jurisdiction as distinguished from rights exercisable on the ground of military necessity in time of war under the order of the competent military authority. Such a grant of the writ would be without precedent and would contradict the numerous passages of authority, which treat it as the means by which inferior Courts are kept from aggrandising their actual, though limited, jurisdiction.

Reliance was also placed on two references to the Year Books, which occur in vol. ii. of Rolle's Abridgment at p. 281, line 23, and at p. 313, lines 35 to 45. I cannot trace the case in 3 Hen. IV.: it may be a wrong reference or it may be the same case as that in M.2 Hen. IV.—namely, the case of the *Vicar of Saltash*. The most, I think, that can be made of the latter is that the Pope's Collector, whose Bull enabled him to hold pleas, was held to be incapable of holding pleas even of spiritual matters within the realm, and accordingly the Vicar obtained a prohibition against him. The Vicar's suggestion, however, was that the matter was one of contract, over which jurisdiction was claimed on the ground that the Vicar had supported his covenant by an oath and that breach of his covenant involved perjury, a matter cognizable in a spiritual Court. This was an old subject of dispute between the King's Courts and Courts Christian. When in reply the Dean of Windsor prayed a consultation, which was refused and the matter appealed to the King's Council, the refusal was no longer put on the Collector's having no jurisdiction in England, but on the ground that the suggestion of perjury did not convert an essentially civil matter into one for a spiritual jurisdiction. It seems to me to be far from certain that the Collector was treated as a "pretended" Court and as having no jurisdiction at all. It is true that Comyns' Digest (vol. vii., p. 137, "Prohibition" A (A1)) treats

him as having none, but Brooke's Abridgment (Jurisdiction, pl. 20) does not go so far, and Sir Matthew Hale, in his notes to Fitzherbert's de Natura Brevium, understands the case as being one of the conflict between actions on contracts and claims to deal with false oaths. I am satisfied, at any rate, that no warrant is to be found here for the proposition that, even if this military Court is altogether without jurisdiction as an inferior Court, it is within the scope of a Superior Court's powers to restrain it by a writ of prohibition.

My Lords, I think there is another difficulty in the appellants' way, which ought to be mentioned. So far as the evidence shows the officers who constituted the military Court are now completely "functi officio" and, as a tribunal, are definitely dispersed, so far as this case is concerned. There is no material to support the surmise that they might be called upon to reconsider either their decision or their sentence. True, judgment, though given, is not yet executed, but the execution is not in the hands of these officers or of any one acting under their directions or authority. It is the general officer commanding who now decides whether the sentence of the Court or some other sentence should be carried out, if at all, and this by virtue of his own military authority, under which he appointed the Court and might have superseded it. He is not a Court nor does he pretend to be one: *Poe's Case.* (1) The truth is that relief should be sought, if at all, by way of habeas corpus. Prohibition is in any case too late, so far as these appellants are concerned. Whether any relief can be obtained by way of habeas corpus is a matter with which I do not deal, but if there is an answer to it, which would bar the appellants' claim to be set at liberty, that answer must be one which is equally fatal to a claim for prohibition.

As to the substance of this appeal I do not wish to be understood to have formed, as I have been careful not to express, any opinion adverse to the view taken by the Irish Courts in the cases cited to us; but, owing to the pendency of other cases, I am content to say no more, and will leave them

(1) 5 B. & Ad. 681, 688.

H. L. (I.) 1921 — CLIFFORD AND O'SULLIVAN.

to be dealt with hereafter, should they be brought in any form before your Lordships' House.

I think the appeal should be dismissed.

Order of the Court of Appeal in Ireland varied by omitting the words "And it appearing that the said Order was made in a Criminal Cause or Matter," and, subject to such variation, affirmed, and appeal dismissed.

Lords' Journals, July 28, 1921.

Solicitor for the appellants: *Herbert Z. Deane, for James G. Skinner & Son, Mitchelstown, Co. Cork.*

Solicitor for the Crown: *Treasury Solicitor, for Chief Crown Solicitor, Dublin.*

END OF VOL. II. AND OF APPELLATE SERIES FOR 1921.